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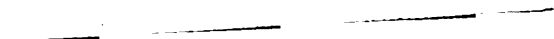
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JUDGMENTS

DELIVERED IN THE

COURTS OF THE UNITED STATES FOR THE
DISTRICT OF MASSACHUSETTS.

JUDGMENTS

DELIVERED IN THE

COURTS OF THE UNITED STATES

FOR THE

DISTRICT OF MASSACHUSETTS.

BY

JOHN LOWELL, LL.D.,

DISTRICT JUDGE.



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CORRECTIONS AND ADDITIONS.

Page 96, note to case of Hyperion's Cargo: This decision was affirmed by the circuit court.

Page 265, line 8, and page 558, line 14, for "*ante*, p. 5," read: "*ante*, p. 7."

Page 310, line 1 of head-note, for "14 Stats. 453," read "14 Stats. 543."

Page 478, fourth line from end, for "S. G. Farmer," read "L. G. Farmer."

DECISIONS
IN THE
COURTS OF THE UNITED STATES
FOR THE
DISTRICT OF MASSACHUSETTS.

BY JOHN LOWELL, DISTRICT JUDGE.

DISTRICT COURT.

HENRY CALLON v. ELISHA WILLIAMS.

FEBRUARY, 1871.

Where a second mate was called on by the mate to help in suppressing a serious riot on board a ship lying at the wharf in a foreign port, and took a loaded pistol, which the mate warned him not to use, and in the scuffle the pistol was accidentally discharged and wounded the second mate himself, — *Held*, he was wounded in the service of the ship.

A consul at a foreign port has no power to discharge a seaman for disability arising from wounds contracted in the service of the ship.

A seaman so situated has a right to be cured and sent home at the expense of the ship, and his wages continue to the time of his return, not exceeding the length of the voyage.

The statutes authorizing consuls to discharge seamen with their own consent do not apply to men who are so ill as to be unable to continue the voyage.

The certificate of the consul, that the seaman was "duly" discharged in such a case, is of no value as evidence.

Where the master sent the clothes of a seaman, who was left in hospital at a foreign port, to the consul's office, and the evidence did not show that the seaman received them, — *Held*, he could recover their value of the ship-owner.

WAGES. — On the 19th of July, 1869, the libellant was shipped at Boston as second mate of the ship *Puritan*, for a voyage to Melbourne and elsewhere, and back to the United States. That voyage ended at San Francisco in March, 1870. The ship arrived at Melbourne about the 5th of November, 1869; and on the 8th of that month, while the vessel was lying at the wharf, some trouble

occurred between the first mate and some seamen and their friends from shore, who were drunk and disorderly. The first officer called up the libellant from the hold to assist in restoring order. The libellant took a pistol from his state-room, in order, as he said, to protect himself, and to frighten the men into obedience, and by some accident shot himself in the hand, inflicting a serious wound, which was not fully healed at the time of the trial. A surgeon was sent for, and by his direction the libellant was taken to the hospital. The ship paid the surgeon's bill, and the hospital dues for eleven days, and then the man was discharged from service, and three months' wages were paid into the hands of the consul. The libellant remained in hospital for some weeks longer, and afterwards at Melbourne, until about the 4th of April, 1870, when he was sent home by the consul by way of San Francisco. The master ordered the second mate's clothes to be sent to the consul's office; but the evidence tended to show that they did not come to the actual possession of the man himself. All the extra wages were expended in the care, attendance, and support of the libellant at Melbourne.

U. G. Thomas, for the libellant.

S. Wells, for the respondent.

LOWELL, J. There is some conflict of evidence as to the precise way in which this unfortunate wound was received; but the tendency of the whole testimony is, that it was not incurred wantonly or recklessly, but in the course of what the second officer considered to be his duty. He was summoned hastily to quell what at sea would have been a mutiny, though at the wharf it ought, no doubt, to have a milder name. He says he was violently assaulted by the drunken men, and was knocked down and kicked in the side. The emergency was sudden, and so serious, that the other man, who was called on to aid the first mate, was frightened and did nothing, and the mate himself was presently obliged to call in the police. Assuming, then, as I do, that the first officer, when he saw the pistol, told the second officer not to use it, and that this was a very proper and humane order, yet I do not find the libellant intending to disobey it. On the contrary, the discharge of the pistol appears to have been accidental.

Under these circumstances, it does not appear very gracious for the owners to strain any doubtful appearances against the only man who stood by the mate, and to insist that he went beyond his duty in their service. He was not enforcing a personal right of his own, nor carrying out any personal quarrel. I cannot hesitate to say that this was an injury incurred in the service of the ship.

Then his general right under the maritime law would be to have his wounds cured at the ship's expense, and to receive his wages during the time of his disability, or, at least, during a reasonable time, not exceeding the length of the remainder of the voyage. *Harden v. Gordon*, 2 Mason, 541; *The George*, 1 Sumner, 151; *Chandler v. Grieves*, 2 H. Bl. 606, n.; *The Latona*, Crabbe, 63; *The Atlantic*, 1 Stuart, Vice Ad. 125. There is no evidence of any stipulation in the shipping articles changing or abridging this right. The contract usual in the whaling service gives the officers and men who are discharged for such a cause only wages *pro rata*; and the validity of such a contract has been recognized by this court in *Brunent v. Taber*, 1 Sprague, 243, and in other cases. An English statute has lately adopted a similar rule. The ship, under that form of contract, remains liable for the expense of the man's sickness and of his return home; and in *Brunent v. Taber* it was held, that the seaman having been discharged by the consul by reason of the disability, and without being consulted, the two months' extra wages paid to the consul could not be charged to him, unless he had received them.

In this case there is a question whether the second mate was discharged with his own consent. The consul certifies that he was "duly" discharged; and the master says he told him he should be obliged to discharge him, and should send his extra pay and his clothes to the consul; that he does not remember what answer was given, but that the libellant made no objection, and he supposed he acquiesced. The libellant denies that he ever assented, or, indeed, ever heard any such conversation. It seems probable that some such notice was given in order to satisfy the consul, and I shall assume that the libellant, being notified, did not protest. The statutes authorizing the discharge of seamen, with

their own consent, were not intended to apply to a case in which the seaman is confined to his bed on shore, at the time the vessel is to sail, by a severe injury or illness incurred in the service of the ship. Such a discharge is nothing more than a recognition of the fact that he cannot go to sea. The statute was intended for a case in which there is some choice exercised to go or stay. And there is no consideration for a relinquishment of the seaman's well-established rights, unless, perhaps, where the two months' extra wages would or might be as much as he would otherwise be entitled to. If a fair contract with full understanding should be arrived at, it might be upheld, though the man were more or less ill; but that he should lose the right to be cured, and sent home from Australia, by a mere assent to the necessity of leaving him behind, is not within the true intent of the statute. A district judge of great experience is reported to have held that the consul's certificate of the seaman's consent to be discharged is conclusive evidence thereof: *Lamb v. Briard*, Abbott, Adm. 367; but as the consul has not so certified in this case, that question does not arise.

The libellant is not to have damages as for a wrongful discharge, because it appears to have been entirely fit to leave him in the hospital; but he may have wages to the date of the ship's return to San Francisco, which appears to have been a port of discharge within the meaning of the contract, and the port where the seamen were, in fact, discharged. The precise date of the termination of the voyage was not given in evidence, but it was said to be about the 1st of March. This would give three months and a half at \$35; that is, \$122.50. Concerning the value of the clothes there is much controversy; and what became of them is not shown; but as no one knows that they ever reached the consul's office, and as the libellant swears he never saw them, he is entitled to recover their fair value. The libellant testifies to an amount of clothing which is shown to be more than men in his position usually take to sea, and more than he seemed to possess, on the testimony of the respondents. But his evidence is, to some extent, corroborated by his boarding-house keeper, and the negative evidence is not full or precise. Allowing for the depreciation which all such property suffers, it seems just to estimate the

Ex parte Columbian Insurance Company. — *Re* Surette.

loss at \$150; which, added to the wages, \$122.50, makes \$272.50. I have not deducted the extra wages, because they appear to have been consumed in paying the hospital dues, passage-money, and other expenses for which the ship was liable, the case being in this respect like *Brunent v. Taber*, cited above.

Decree for libellant for \$272.50 and costs.

Ex parte COLUMBIAN INSURANCE CO. — *Re* L. A. SURETTE.

MARCH, 1871.

A. was sued; and B., who owed him a debt, was summoned as his trustee (or garnishee), and defaulted, and afterwards went into bankruptcy, and A. proved the debt. Afterwards the attaching creditors obtained judgment and issued execution against A., and against his funds in the hands of B., and made demand on B. and on his assignees in bankruptcy to pay them the debt towards the satisfaction of the execution, which was refused. They then proved the supposed amount of the debt owed by B. to A. against B.'s estate in bankruptcy.

Held, they had no provable debt, and were not creditors of B. at the date of the bankruptcy.

Whether the lien which they held upon the debt by virtue of their attachment was absolutely dissolved, or might have been availed of in some way by applying to the equitable powers of the court, *quære?*

Whether the first judgment alone, before *scire facias* brought, would have made them creditors of B., if recovered before the bankruptcy, *quære?*

LOWELL, J. The receivers of the Columbian Insurance Company, a corporation established in the State of New York, petitioned the court for the dividend which had been declared upon the debt proved by them. The assignees, in their answer, set up that the debt ought not to have been proved, and pray that it may be expunged. The assignees should have moved to expunge as soon as they discovered that the debt was proved. It is no answer to a demand for the dividend that the debt was improperly allowed. But as all the facts have been brought to my notice, and the case has been argued, I may treat the answer as a motion to stay the dividend until the assignees can have the question properly passed upon.

Surette owed the insurance company a large sum of money for

Ex parte Columbian Insurance Company. — *Re* Surette.

premium notes overdue; and before his bankruptcy the company was sued in the superior court at Boston by John S. Hall & Co., and Surette was summoned as trustee. He entered no appearance, and was defaulted; but the receivers of the company came in, and claimed the funds, on the ground that the proceedings in New York to dissolve the corporation took precedence of the attachment in Massachusetts. This point having been decided against them in one of the cases involving the same considerations, they withdrew their claim, and Surette was charged as trustee of the company, and judgment was obtained against the company and against their funds in the hands of Surette; but this was some months after the bankruptcy. Upon the execution, demand was duly made upon Surette and upon his assignees in bankruptcy to pay the debt to the judgment creditors. After this, John S. Hall & Co., the judgment creditors, proved against Surette's estate here the supposed amount of his debt to the company. The latter, acting by the receivers, had proved the same debt long before that time; so that this debt has been twice proved.

According to the decision of the supreme judicial court in *Pingree v. Hudson R. Ins. Co.*, 10 Gray, 170, Surette might plead his discharge, if he obtained it, as a bar to the suit as against him; and the reasoning of the court is, that the bankruptcy works a virtual release of the attachment, and authorizes the creditor whose debt has been attached to prove in bankruptcy, notwithstanding the trustee process. It follows that the receivers had the right of proof, and must hold the dividend. I see no other result which can be worked out in this case. The attaching creditors had no debt against Surette which they could prove at the time of the bankruptcy; and, though they have obtained a judgment since, yet that cannot relate back, because it was not founded on a provable debt. All that Hall & Co. had at the date of the bankruptcy was a lien upon the debt which Surette owed to the insurance company; but there is no decision or principle of law by which they had, as matter of right, the power to prove the debt in the name of the company. It may be that the bankrupt court could work out an equitable remedy if applied to in time; or perhaps the State court in

The Tangier.

which the attachment was pending might do so, — a remedy, I mean, by which the lien should be preserved and applied to any dividend that might be paid upon the debt. No application was made to either court, and both parties stand on their legal rights.

I cannot hold that a judgment creditor obtaining his judgment, and making demand on the garnishee long after the bankruptcy, has a debt provable *ex parte* against the garnishee's estate in bankruptcy. It is doubtful whether he would have had such a debt, even if the judgment had been entered up before bankruptcy, because his next step is *scire facias*, to ascertain the amount for which the garnishee shall be his debtor; the first judgment merely being that the latter holds something which, upon due demand, he must pay over to the judgment creditor. After demand, he might, perhaps, be considered a debtor for an amount which the bankrupt court would be capable of liquidating.

In this case, reserving my opinion whether an equitable remedy could ever be worked out, and in what mode, I hold that

The proof made by the receivers must stand, and that of Hall & Co. must be expunged.

THE TANGIER.

APRIL, 1871.

One who advances money in good faith, to enable the master of a foreign vessel arriving here to pay the custom-house charges and the wages of his crew, has a privilege against the vessel for these advances.

To create a privilege on the ship, it is enough that the advances are necessary to free her from debts previously due, which are a charge on the ship.

If the person making the advances were not himself a material-man, he might yet have a privilege by subrogation to the rights of the seamen and others whose claims he has paid.

The doctrine of subrogation in the admiralty, and the case of *The Larch*, 2 Curtis, C. C. 427, discussed.

MATERIAL-MEN. — The libellants, ship-chandlers of Boston, furnished money to the master of the brig Tangier, of Bangor, to pay off his crew, who had arrived here at the end of a voyage

The Tangier.

from Savannah, by way of the West Indies; and the money, or most of it, was proved to have been applied to the purposes for which it was borrowed. There was evidence tending to show that Captain Grant, the master of the vessel, had not followed the instructions of the owners in going to Savannah, and that they had determined to remove him, and had sent one of their number to Boston for that purpose. The vessel was consigned to Messrs. Lewis & Hall, of Boston; and this fact was known to the libellants, but they did not know that one of the owners was here. This owner, Mr. Huckins, had an interview with the master soon after his arrival, and before most of the money had been advanced, though after it had been promised, in which he notified him of his removal; but this, too, was unknown to the libellants, who afterwards went to the custom-house with the master, and entered the vessel and paid the dues, and made the further advances. When the libellants presented the bill to the consignees they referred him to Mr. Huckins, who refused to pay the bill, saying, that the master had been displaced.

The claimants in their answer denied that Captain Grant was master of the vessel at the dates mentioned in the libel, and alleged that the owners were known to the libellants, and were in good credit in Boston, and that one of the owners was present with ample funds to meet all disbursements, and that the master himself had funds, all which might have been ascertained on due inquiry. That the libellants had already brought an action in the superior court for the county of Suffolk against the master, in which they had summoned the consignees of the cargo as trustees, and another action against the owners, or some of them, in the same court; both of which actions were still pending. There was evidence to sustain the allegations of the credit enjoyed by the owners, and of the previous action brought by the libellants, but not that the libellants knew who the owners were. They made no inquiries excepting of the master. There was some evidence that the master remained in actual command until the cargo was unladen.

J. C. Dodge, for the libellants. We made due and sufficient inquiry of the person whom we had a right to consider the rep-

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representative of the ship. *The Grapeshot*, 9 Wall. 129. The merchant who furnishes money for supplies, repairs, and other necessities in a foreign port has the same privilege with the person who makes the repairs or furnishes the supplies, &c. *Thomas v. Osborn*, 19 How. 29; *Davis v. Child*, Daveis, 71.¹ That there was a lien for such necessities as were furnished in this case, notwithstanding the voyage, or one definite part of it, ended at this port, see *The Edmond*, Lush. 57; *The Vibilia*, 1 W. Rob. 1. *The William F. Safford*, Lush. 69, shows that we may be subrogated to the privilege of the crew. If the master sailed the vessel on shares, this lien is necessary for our protection. *The James Guy*, 9 Wall. 758.

R. D. Smith, for the claimants. A lien cannot be asserted here, because there was no necessity for the supplies nor for the credit. *Pratt v. Reed*, 19 How. 359. The payment of a debt due for necessities is very different from advancing money to procure necessities. *Beldon v. Campbell*, 6 Exch. 886, explaining *Robinson v. Lyall*, 7 Price, 592. Here the master had ceased to be the agent of the ship, and could no longer bind it by his contracts. *Webb v. Peirce*, 1 Curtis, C. C. 104.

LOWELL, J. In the case of *The A. R. Dunlap*, 1 Lowell, 350, I expressed the opinion that *Pratt v. Reed* must have been decided on its own peculiar facts, which certainly tended strongly to show an exclusive personal credit for the supplies which were furnished to the vessel. In the late case of *The Grapeshot*, 9 Wall. 129, the supreme court have conclusively settled this vexed question, and the lien is now re-established on its ancient foundation, or nearly so. It cannot be doubted that the privilege of the material-man who supplies a foreign ship extends to the creditor who advances money for the purchase of necessities, as well as to the ship-chandler or mechanic who actually supplies them: *Davis v. Child*, Daveis, 71, approved in *Thomas v. Osborn*, 19 How. 29.² And so is the law of England: *The Sophie*, 1 W. Rob. 368; *The Onni*, Lush. 154; *The Affina Van Linge*, Swabey, 515. A distinction, however, is taken by the claimants between the advance

¹ 2 Ware, 78.

² See acc. *The Emily Souder*, 17 Wall. 667; *The Riga*, L. R. 3 Ad. & Eccl. 516.
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of money for necessities to be furnished, and an advance for the payment of an already existing debt for necessities. A master, it is said, cannot hypothecate his vessel, excepting for the purpose of helping on her voyage; and such necessity is not presumed to exist in respect to personal debts of the owner or of the master, even though the latter be imprisoned in a foreign port for non-payment of such debts: *The Prince George*, 4 Moore, P. C. 21; *The N. B. Gosfabrick*, Swabey, 344. This doctrine extends to bottomry bonds as well as to tacit or implied hypothecations. So that, for instance, the necessity of liquidating damages incurred in respect to outward cargo does not authorize the master to give a bottomry bond for the amount, unless the claim would be a lien on the ship by the law of the place where the payment is made; but where there is such a lien, the presumption is against a personal credit, and the bond is well justified: *The Vibilia*, 1 W. Rob. 1. So at common law it has been held, that one who has advanced money to the master to pay a debt contracted for towage is a mere volunteer, and cannot maintain an action against the owner. *Beldon v. Campbell*, 6 Exch. 886. That decision has no very great importance in the admiralty, excepting as it illustrates this point; for, by the civil law, a mere volunteer may maintain an action under like circumstances, though he might not be entitled to subrogation to a privilege. The important difference between that case and this is, that the towage in the former was a mere contract. If the vessel had been foreign, the rule would have been different. That one who pays my debt upon the request of my authorized agent is a volunteer would be a somewhat remarkable notion. There is no sort of doubt that the master has such authority in respect to such a debt in a foreign port. In Massachusetts, a master may pledge the credit of his owners, who live in New York, for the payment of wages already earned: *Stearns v. Doe*, 12 Gray, 482. The question in this part of the case is whether a merchant or ship-broker who advances money to pay the crew is a material-man, or is merely a creditor who volunteers to pay an antecedent debt. And I confess myself unable to see any less necessity for the present payment of the crew of a vessel in a foreign port, if their wages are due them there, than for pro-

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curing supplies and repairs for the further prosecution of the voyage. And, so far as my examination has extended, the decisions confirm this opinion. In many of the cases, the particular necessities of the ship which have been supplied by the material-man are not set out; but, so far as can be discovered, the cases put money for wages already earned on the footing of necessities. *The Duke of Bedford*, 2 Hagg. 294; *The Dare*, *The Unity*, 3 id. 148, n. I am aware, of course, that the decision in the case of *The Neptune*, in a note to which these two last cases are cited, was reversed by the privy council, and rightly, but not on any question of this sort; and these cases are still valid decisions to the point to which I cite them, and I have found none of a different tendency. Then there is the case of *The William F. Safford*, Lush. 69, cited at the bar, where an American whaling-ship was arrested at Liverpool for a debt for necessities, and several other similar actions were entered against her, including one on a bottomry bond and one by John Da Costa, of Liverpool, for necessities, which were wages paid by him to the crew at the request of the master, on account of the ship. Da Costa's claim was ordered to be paid first. "If he had not advanced the money," says the learned judge, "the seamen would have no doubt arrested the ship, and enforced their right to priority of payment." The distinction, therefore, between paying a past debt and contracting a new one ought not to be extended to a payment for wages due in the foreign port, and for which the crew have a present privilege against the ship. It has not been so extended by the courts.

In the present case there is no evidence of any fraud or negligence on the part of the libellants, and there is evidence, though not wholly uncontradicted, that the necessity was real. It appears that the bank check given to the master was actually applied to pay the crew, and that the master was not in fact displaced till after the advances were made, but entered the vessel at the custom-house, and did all the usual work of a master, until several days after this time. Every thing concurs to give the libellants the position of material-men.

The libellants claim a lien upon another and distinct ground, that of subrogation. It must be admitted that the law of this cir-

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cuit refuses to the master himself a lien on the ship for his disbursements. See *Ex parte Clark*, 1 Sprague, 69, and notes; *The Larch*, 2 Curtis, C. C. 427. The reasoning in the case of *The Larch* goes much beyond the decision; and seems to assert, if I do not misunderstand it, that, independently of the general and difficult question, whether the master himself, holding a peculiar and confidential relation to the owners, ought to have a privilege on the ship, however derived, the doctrine of substitution or subrogation would not aid him, because, when he has paid one of the ship's debts, it is paid, and there an end, and that subrogation can never be decreed unless there is some actual outstanding legal title, like a mortgage, upon which to attach it. If that is the meaning of the decision, its adoption would make sad havoc with subrogation. The opinion cites the famous case of *Copis v. Middleton*, 1 Turn. & Russ. 224, and one or two others which followed it, as authority for this broad and sweeping destruction of the law of subrogation. In that case, Lord Eldon decided, contrary to the whole current of decisions on analogous subjects, that a surety on bond who paid the debt did not thereby become a specialty creditor of his principal. It was very much like those decisions in which it used to be the fashion to say that an implied promise could not be maritime, and within the jurisdiction of the admiralty. The decision was never approved in England, and was repealed by act of parliament (19 & 20 Vict. ch. 97, § 5) about the time that *The Larch* was decided. Its doctrine never was the law of this country. In the few States of this Union in which the distinction between creditors by bond and creditors by simple contract is or was preserved in the distribution of assets, the doctrine of *Copis v. Middleton* was not generally admitted: *Lidderdale v. Robinson*, 12 Wheat. 594; *Shultz v. Carter*, 1 Spear, Eq. 533; *Croft v. Moore*, 9 Watts, 451; *Smith v. Swain*, 7 Rich. Eq. 112. So in those States where a judgment has priority, the surety, whether joined in the judgment as a defendant or not, is entitled to the lien: *Lathrop & Dale's Appeal*, 1 Barr, 512; *Cottoral's Appeal*, 23 Penn. St. (11 Harris, 294); *Goodyear v. Watson*, 14 Barb. 481; *Speiglemyer v. Crawford*, 6 Paige, 254; *Baily v. Brownfield*, 20 Penn. St. (8 Harris, 41). The learned editors of the *Leading Cases in Equity*, vol. ii.,

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in their notes to *Aldrich v. Cooper* (3d ed. pp. 226 *§ seq.*¹), writing while *Copie v. Middleton* was, or was supposed to be, still in force there, though they pointed out its discrepancy with other English decisions, say: "In this country, however, the courts proceed on the more liberal principle of regarding payments made by a surety to the creditor as *prima facie* intended to advance and not to defeat his rights against the principal." And they support this statement by ample citations.

Besides, the doctrine of that decision, while it lasted, was never applied in England to a case where there was any mortgage, pledge, or lien of any kind to the benefit of which the surety could be substituted, but was confined to the mere case of one paying what the court was pleased to call his own debt. The distinction taken in the opinion of *The Larch*, p. 429, between our law and that of Rome,—namely, that the latter by a laudable fiction presumed an assignment, when, in fact, there had been a mere payment, while our law recognizes no such fiction,—cannot be maintained. Our law, in numerous instances, adopts that precise fiction, and subrogates a surety, or other person equitably entitled to that remedy, not only where the debt has been paid, but where the security has been actually discharged, whether by fraud or mistake, or however otherwise. Even at law the right of an insurer to subrogation to a cause of action against a wrong-doer cannot be discharged by the assured on receiving full payment from the wrong-doer: *Hart v. Western Railroad Corp.*, 13 Met. 99. A mortgage discharged in all due form will be considered assigned when equity requires it; and so in many other well-known cases. The courts of law, equity, admiralty, and bankruptcy, each in its own mode, all recognize subrogation to liens and privileges in a great variety of circumstances analogous to those at bar. I do not, of course, mean to say that a debt may not be extinguished, if such is the true intent of the parties; nor that a mere volunteer is entitled to a privilege; but the evidence here shows an advance, in a foreign port, to one who appeared to be the master of the ship, which excludes both of these considerations.

¹ 4th ed., vol. ii. pp. 278 *et seq.*

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In trover by the assignees of a bankrupt, the defendant, who held a ship by a bill of sale from the bankrupt that was absolutely void under the registry acts, was permitted to deduct from the value of the vessel the sums he had paid in a foreign port for salvage and wages, as well as certain damages, for which the vessel had been attached for non-fulfilment of a contract of affreightment: *Richardson v. Campbell*, 5 B. & A. 196, 203, n. This allowance is put on the ground of lien; and it could have no other basis, because there was no mutual credit between the bankrupt and the defendant, and no right of set-off at that time in trover; so that the lien could avail the defendant only by subrogation. A surety on bond to the government who pays the debt is subrogated to the priority of the sovereign: *Hunter v. United States*, 5 Pet. 172; *Dias v. Bouchaud*, 10 Paige, 445; *Reg. v. Salter*, 1 H. & N. 274. A surety in bankruptcy is subrogated to all the rights of the creditor, and so the creditor may insist on all the advantages given to the surety. It is usual and good practice in the admiralty, when a ship is under arrest, for one of the parties plaintiff to obtain leave to pay off the crew with full subrogation. *The Kammerhevie*, 1 Hagg. 62; *The John Fehrman*, 16 Jur. 112. When such a petition is denied, it is because the owners are not before the court, so that it is improper at that stage of the case to go into the question whether the wages are in fact due: *The Adolphe*, 3 Hagg. 249. It has been the practice lately in England to require the person who pays the wages to apply to the court before he makes the payment; but such previous authority is not insisted on, as yet, in all cases. *The Cornelia Henrietta*, L. R. 1 Ad. & Eccl. 51. In this country a bondholder has been rebuked for requiring an assignment from the seamen of their claims, the court saying, that if the bondholder paid the wages, the law would make the assignment, and that he could recover the whole sum for his bond debt and wages, in one libel. *The Cabot*, Abbott, Adm. 150.

It was not contended that the suits which are pending at common law, and are resisted by the owners or in their interest, can be availed of as a bar. Nor do I understand that the claimants deny that a few of the items, such as the custom-house dues, and the wages of the steward, who still remained on board, would be

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a charge on the ship, provided the master were still capable of representing the vessel when those moneys were paid. It is impossible, upon the evidence, to say that the master was actually deprived of command so early as the answer represents it; but, if he were, and the owners intrusted him with the duty of entering the vessel and paying off the crew, it will hardly do to say that he was not their agent for those purposes as fully as if they had never removed him at all. If his agency had ceased, the equitable doctrine of subrogation might be invoked. Either way, the libellants must succeed.

Decree for libellants for \$451.24 and costs.

JOHN W. FLANDERS v. GEORGE F. TRIPP & AL.

APRIL, 1871.

A vessel that is within pilotage ground, but disabled so that she cannot get into port without steam, is not bound to accept the offer of a pilot, or pay his fee.
A pilot is not bound to take charge of a disabled vessel for the usual pilot's fee.

PILOTAGE. — On the 5th of October, 1869, the respondent's ship, General Scott, on her return from a whaling voyage, was forced on shore near her home port of New Bedford, but was got off by her crew, and came to anchor near Round Hill Light. The libellant, who was a branch pilot at New Bedford, saw the vessel at anchor, and went from that city with other persons such as usually visit a returning whaler, and was the first pilot that boarded the vessel. He found the mate in command, who informed him that the master had gone to town for a steamer and a pilot, and that the ship was unable to proceed without steam, by reason of an injury to her rudder. Some time afterwards the master came down with a steamer and a pilot, and the vessel was brought up to her wharf in safety. Whether or not the libellant actually served as pilot, or only offered his services and was refused, was the principal dispute of fact; though the extent of the injury to the rudder was not fully agreed.

G. H. Palmer, for the libellant. By the laws of Massachusetts, the libellant has earned his fee, whether his services were

accepted or rejected. Stat. 1862, ch. 176; *Smith v. Swift*, 8 Met. 329; *Martin v. Hilton*, 9 id. 371; *Hunt v. Carlisle*, 1 Gray, 257; *The America*, 1 Lowell, 176; *Com. v. Ricketson*, 5 Met. 412.

C. T. Bonney, for respondents. This ship was a wreck, and therefore not bound to accept the offer of a pilot. The master had, in fact, engaged a pilot before the libellant arrived.

LOWELL, J. The facts of this case are not far to seek. The libellant boarded the ship in the hope of being the first pilot to reach her; and he was so; but the mate refused to employ him, alleging that the ship was not fit to be navigated by the power of her sails alone, and that the master had gone on shore for a pilot and a tug; which was true. The libellant made continual claim, so to speak; but his right to recover depends not upon a *quantum meruit*, for he rendered no services at the request or with the consent of the agents of the respondents, but upon his statute right, as being the first pilot to offer.

It is admitted to be the general rule, that the pilot who first offers his services to an inward-bound vessel, of the class mentioned in the law, has the first right, which the master may disregard, but under pain of paying the fee, as a debt recoverable against him or his vessel or owners in a civil suit: Stat. 1862, ch. 176, sched. 5; *Com. v. Ricketson*, 5 Met. 412; *The America*, 1 Lowell, 176; *Ex parte McNiel*, 13 Wall. 236. The respondents insist that there is an implied exception of vessels which cannot be navigated by the pilot without further assistance in the nature of a salvage or *quasi* salvage service. Upon this point I have not been referred to any decisions of the Massachusetts courts, and must therefore decide it upon my best judgment of the true intent of the statute. The better opinion is, that pilots are not bound to take charge of a wrecked or disabled vessel for the established pilotage fee, because such vessels require for their successful navigation more than the ordinary skill, labor, and risk that pilots impliedly contract to give in return for that fee. They may, therefore, decline to act in such cases, if the master insists that he will only pay them wages: *The Frederick*, 1 W. Rob. 16. There are many other cases on the subject of pilots as salvors which virtually decide the same

point, among the more important of which are *Hobart v. Drogan*, 10 Pet. 108; *The Wave*, Blatch. & How. 235; s. c. on appeal, 2 Paine, 131; *The Dido*, id. 243; *The Alexander*, id. 466; *The Jonge Andries*, Swabey, 226; s. c. on appeal, 11 Moore, P. C. 313; *The Richmond*, 4 Law Reporter, 20; *The Hebe*, 2 W. Rob. 247; *The Susan*, 1 Sprague, 499.

Some apparent discrepancies in the judgments of different courts may be reconciled by the consideration, that a pilot, once engaged on board a vessel, has become bound to render his best services, and is under an obligation, for the time being, somewhat analogous to that of the master; but before his engagement he is merely an officer appointed by public authority, enjoying a monopoly, and undertaking to render certain specified services, at whatever inconvenience short of imminent danger to his life, for a reward which the governing body has seen fit to prescribe as sufficient to compensate him. Such a person is not to set up the state of the weather, or any consideration of that sort, as making him a salvor; but to say that he is bound by his official position to do something entirely different from the duty which the very nature of the office points out, as, for instance, to tow the ship into port, without further compensation than a pilot's wages, cannot be maintained, and is not supported by the weight of authority. The decision of Judge Betts in *The Wave*, in which the subject was very fully and ably discussed, was reversed by the circuit court on the single ground that a statute of New York made it the duty of pilots to assist vessels in distress, and provided for an extra compensation, though not for salvage: 2 Paine, 131. Two other cases in the same volume recognize the true doctrine that if pilots, not already engaged, are asked to perform duty which is not only pilotage, but something more, they are entitled to more than the pilot's fee: *The Dido*, 2 Paine, 243; *The Alexander*, id. 466. What was done with the statute in the former of these cases, which appears to have arisen within the jurisdiction of New York, I do not know. As I find nothing in the statute law of this State that requires pilots to assist vessels in distress, or provides for any special mode of compensation in such cases, I consider that the general rule holds here, that they are not bound to be salvors, without salvage compensation.

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I am of opinion that the rule is reciprocal, and that as a pilot is not bound to take upon himself the duty of a salvor of a disabled vessel, without the advantages of that position, so a ship which stands in need of a salvage service is not bound to accept the offer of pilotage, if her need is for something more, which the pilot cannot supply. In this case, the General Scott would probably have been safe at her wharf long before the libellant discovered her, had it not been for the disaster which obliged her to anchor and wait for a steamer; and the master had actually engaged both a steamer and a pilot, though they had not yet reached the vessel. Under the circumstances, the offer to pilot the ship was an offer to do what no one could do until the ship was either repaired or taken in tow. If the ship had been coming up in tow, but without a pilot, or if the master had engaged a steamer, but not a pilot, the case might be different. I hold, therefore, that this ship was not bound to accept the offer of a pilot, under the penalty of paying his fee if his services were refused.

Libel dismissed without costs.

Re JOHN E. DUPEE.

APRIL, 1871.

The district court, sitting in bankruptcy, has the power to recall a final decree, granting a discharge to a bankrupt, upon application made during the term of court at which the decree was passed.

It seems that the court has the power to do this after the term has passed.

This power will be exercised in a case in which counsel opposing the discharge was prevented by a sudden and overpowering accident from being present at the hearing, if it should be made to appear that the opposing creditors were in fact prevented by the accident from presenting their case, and that they believed they had a good case upon the merits, showing actual fraud in the bankrupt.

In this case, the firm of Stephen, Hill, & Stevens, creditors of the bankrupt, filed specifications of objection to his discharge; and a day was set by notice of the debtor, agreed to by the creditors, for a hearing before the court, neither party having asked for a jury. On the day appointed the debtor attended, and just

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before the adjournment of the court asked for his discharge, and made proof of the notice and agreement. The creditors not appearing, the order was passed, and the discharge was issued in due form. Soon after, and within the same term, the creditors filed a petition, setting forth that they were contesting and intending to contest the discharge, and that their counsel was unavoidably prevented from being present, or from informing them, in order that they might obtain a postponement; they therefore prayed that the order might be rescinded and the discharge recalled. The debtor appeared and offered the petition.

W. W. Warren, for the petitioners.

G. A. Somerby & W. N. Mason, for the debtor.

LOWELL, J. There is nothing in the bankrupt act which bears directly upon this case excepting sect. 34, authorizing the court to set aside a discharge for certain causes and under certain circumstances, one of which is, that the creditor asking for such reversal had no knowledge of the facts before the discharge was granted; a circumstance which these petitioners cannot truly allege. They therefore invoke the power which they say every court has to vary or annul its decree, when justice requires it. This power is denied by the bankrupt. No decisions were referred to by either party, excepting those in the southern district of New York, in which the court reheard the case after refusing a discharge. The power of the court does not seem to have been brought in question in those cases; nor does it appear very clearly that any final decree had been made in them before the rehearing. In this case, a final decree was rendered under sect. 32, and a certificate thereof was given, and the case in bankruptcy was closed.

This would seem to be the termination of the jurisdiction which by sect. 1 is to last until the close of the proceedings in bankruptcy. Still I think the court must have the same inherent power as all other courts to recall its own decrees, or to vary or amend them, as justice may require. All the courts claim and exercise this power, when it is the only remedy for the party aggrieved. It has been admitted in criminal as well as in civil cases that the court may vary its judgment and impose a different sentence at any time during the same term. *Com. v. Wey-*

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mouth, 2 Allen, 144, and 'see the cases cited in that decision. In admiralty, the time and mode of opening a final decree in a defaulted action are regulated by a general rule of the supreme court; but this is not understood to take away the right to rehear cases not falling within the rule. 2 Conk. Adm. 360.¹

It is not necessary to define the limits of the power, or the precise mode of its exercise, excepting to this extent, that the courts have uniformly admitted and exercised the power of rehearing a cause, and changing or reversing the judgment or decree during the term in which it was made. Even the supreme court will exercise this power on suitable occasions, although, in an appellate court, where there is little liability to accident in the trial, those occasions are rare. That court has held that this power, when exercised summarily, must be invoked during the term, even in equity, though, in general, the proceedings in equity have little relation to terms of court. After the term has passed, there must be plenary proceedings by bill or libel of review. Here the term is still open, and no very formal proceedings would seem to be required. It is not a case for the supervisory power of the circuit court, and I do not see that there is any other remedy than the one now asked for.

If, however, no injustice has been done, or if the petitioners were not, in fact, prevented from trying their case by the accident referred to, they ought not to be permitted to litigate anew. If they shall file affidavits showing that they were prepared with evidence to substantiate the specific charges of fraud alleged by them, and that they would have been ready to try those questions on the day appointed, and that they believe they have a good case on the merits in respect to those charges of fraud, I will reopen the decree so far as such frauds are concerned. I do not think I ought to do so for any mere technical matter, such as an inaccuracy in book-keeping without fraud.

Ten days to be allowed for the petitioners to file affidavits.

¹ See *Ex parte Lange*, 18 Wall. 163.

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THE CAMBRIDGE.

JULY, 1871.

In the admiralty practice of this country there is no rigid rule that a libellant in a collision cause, alleging one fault on the part of the defendant vessel, cannot recover on proof of a different fault.

Some cases on this point examined.

Where the libel alleged only that the defendant steamer ported when she should have starboarded, and the evidence for the steamer proved that she was running at too great speed in a fog, and had no lookout forward, — *Held*, the libellant could rely on these faults as well as on those which he had alleged.

Where a vessel damaged by collision was sold at auction without sufficient examination of her condition, and without notice to the defendants, who had said they would do what was right about the collision, and it turned out that she might be raised and repaired conveniently and without a large outlay, — *Held*, the owners could not recover for a total loss, but that the damages must be adjusted as upon a partial loss only.

In assessing the partial loss, an allowance may be made for the salvage which would have been paid if the owners had procured her to be brought in and repaired.

Demurrage allowed at the rate of eight cents a ton of the vessel's carrying capacity for every day's delay.

LIBEL by the owners of the schooner Susan Ross against the steamer Cambridge for damage by a collision which took place on the night of the 15th of June, 1870, about ten miles from Monhegan Light, on the coast of Maine. The night was foggy, and the wind light. The libel averred that the schooner was heading south by west, close hauled, had her lights properly set and burning brightly, and that a suitable fog-horn was constantly sounded; that her crew heard a steam-whistle and soon after saw the steamer bearing about south-west by west from the schooner, a little forward of the starboard beam, and distant about two hundred and fifty yards, and the master immediately fired a gun; that the steamer should have starboarded her helm, but ported, and ran into the schooner and sunk her.

The answer denied that the schooner had any lights but one white light in the binnacle, and a hand-lantern, and averred that the fog-horn was sounded only once; that the schooner was first seen on the port bow of the Cambridge; that the helm of the steamer was at once put to port, and the engines reversed, and every thing that was possible was done to avoid the collision;

that the gun was fired too late to do any good. The pleadings contained no allegation concerning the speed of the steamer, or the state of her lookout; but the evidence for the defence showed that she was making her usual rate of twelve knots and more, and it did not appear that she had a lookout forward. The master of the steamer testified, that, when the night was foggy, he always calculated his position by the time he had been running, and always kept up his exact speed.

J. C. Dodge, for libellants.

E. D. Sohler & C. H. Drew, for claimant. The only fault set up in the libel is porting our helm; nothing is said about our speed or our lookout; they can therefore only recover if the collision was owing to this action of the steamer. Now, whichever way the helm had been put, we should have struck her. The fog was so dense that we could not have gone by on either side after seeing the schooner. The accident was inevitable.

LOWELL, J. It has been ruled very often, that however unavoidable a collision may have been when the vessels first saw each other, it is their duty to take every possible precaution not to be brought into such a position. This rule required the schooner to have the red and green lights properly placed and burning brightly, and to sound a fog-horn as often as once in every five minutes, and perhaps oftener, when it was found to be necessary; and the steamer to keep a good lookout forward, to go at a moderate speed, and, when the schooner was heard or seen, to stop and reverse her engines, if necessary. There is very little doubt upon the evidence that the schooner had the lights and sounded the horn; and as little, that the steamer had not the lookout, was going too fast, and did not stop in season. Captain Johnson heard a horn, and, being uneasy at not hearing it again, slowed his engine and ported his wheel before seeing the schooner. It is to be regretted that he did not then reverse his engine, and wait until he was sure whether he ought to go to port or to starboard. It has become familiar not only to the profession practising in the admiralty courts, but to seafaring men, that one lookout man, at least, must be stationed forward; and the want of this precaution on such a night cannot be explained away by any evidence to show that the master and pilot would do

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as well, or better. Evidence of that kind, though admitted at circuit, by Taney, C. J., was overruled with something like scorn by the supreme court: *Haney v. Baltimore Steam Packet Co.*, 23 How. 287; *St. John v. Paine*, 10 id. 557; *The New York*, 18 id. 223; *Chamberlain v. Ward*, 21 id. 548; *The Ottawa*, 3 Wall. 268. Then, again, the speed of the steamer was excessive. I have often had occasion to say that the owners and masters of steamboats must either comply with the statute, or procure its repeal. It is impossible for the courts to overlook a plain breach of the written law, upon any considerations of hardship in its application. It is useless to cite the many cases which show what is a moderate rate of speed for a steamer in a fog. No general rule has ever been attempted to be laid down but this, — that the speed should be such as will enable the steamer to avoid the other vessel after she shall be able to make her out. This test may seem a little too much like deciding each case by the event, and holding any speed too great where there has been a collision; but it has been adopted by high authority, both here and in England: see *The Monticello*, 1 Holmes, 7. I do not know that any test is universal; but this has the advantage of adapting itself to the density of the fog and the working qualities of the steamer, and will do, perhaps, for most cases. If it be true that the schooner was seen as soon as she became visible, and that it was then impossible to avoid her by any manœuvre or combination of manœuvres, then it would seem to follow that the steamer should have been in a condition to stop her headway more quickly than she could when running at her full speed of twelve and a half knots. All that I intend to decide here is, that this rate was too great.

It is argued that neither the speed of the Cambridge, nor her lookout, are put in issue by the pleadings; and that therefore she cannot be found in fault in these particulars. The proposition is sound, that in admiralty courts, as in all others, a plaintiff can recover only *secundum allegata*. This rule has had some rather singular applications; as where the owners of a vessel damaged by collision were permitted to recover one half their damages, but refused the other half because their pleadings and proofs did not correspond. This is the exact result of the decision

of the appellate court in *The North American*, 12 Moore, P. C. 331. See further on this point, *The Ann*, 13 id. 198; *The East Lothian*, 14 id. 177; *The Minnehaha*, 15 id. 133; *The Alice*, 5 id. n. s. 300. These cases decide that a libellant shall not be permitted to aver one fault, and prove a wholly different or opposite one; as, if he says the other vessel starboarded, he shall not recover if she ported. But even in those courts, all that a vessel which has the right of way is bound to allege is, that she kept her course, and the other party is then to show an excuse for the collision. *The East Lothian*, 14 Moore, P. C. 183, *per Lord Chelmsford*. In *The Schwalbe*, Swabey, 523, the learned judge says, "The collision takes place at night, in darkness, and many important facts which bear upon the collision taking place on board one ship are unknown on board the other. Thus it cannot be known on board one ship what orders were given on board the other, what words passed, what lookout was kept, and so on. If these are discovered subsequently to pleading, there can be no wrong done in admitting evidence of them, if the other party has opportunity of giving his contradiction." Those remarks are precisely applicable to the case at bar, and fully answer the argument and citations.

In our courts the question is treated as a matter of evidence rather than of pleading. If surprise is shown, there may be reason for excluding the testimony, or for giving time to meet it. If the witnesses of one side vary the case from that which his pleadings set up, it may be a reason for disbelieving them. But it is the practice of our courts of admiralty rather to extract the truth, and found a decree upon it, whenever, by amendment or otherwise, justice can be fully done to both parties, than to follow any very strict rules of variance. *The Quickstep*, 9 Wall. 665; *The Syracuse*, 12 id. 173; *Dupont v. Vance*, 19 How. 162; *The Clement*, 2 Curtis, C. C. 363. I do not mean to say that this is not the practice in England. I think it is. The cases which seem to show a departure from it are exceptional, and appear to have been decided without argument and upon their special circumstances. The true mode of declaring in collision cases is for each party to allege what happened on his own vessel; and he may, undoubtedly, add whatever he believes to have been done by the other; but he ought not to be held to prove too strictly

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the latter part of his allegations, in which he is liable to be mistaken. In this case, the owners of the schooner having alleged that they had the required lights, and sounded a horn, and did not alter their course, the steamer might be expected to set out what look-out she had, what her speed was, and what measures she took. This is done only in part. Upon the examination of her own witnesses the rest comes out, without any suggestion of surprise or any doubt of the truth of their statements. This brings the testimony within the points decided in *The Quickstep* and *The Syracuse, ubi supra*.

Were it not so, yet in this particular case the fault alleged in the libel appears to be made out. The steamer's helm was ported before the schooner was seen, and before her position was known; for the master testifies distinctly that he was uncertain where to look for her. In porting at that time, he took the risk of its being the right thing to do. If he had reversed his engine then, and starboarded when he saw the schooner, I have but little doubt he might have cleared her. The general statement by the master and pilot, that they knew of no other course which would have had any better result, must be taken to mean, as I apprehend, that they exercised their best judgment at the time. If it means more than that, and they intend to say that no measures could have prevented the collision, they are mistaken.

Interlocutory decree for the libellants.

A hearing was afterwards had upon the assessment of damages. The schooner had been towed to a place on the coast of Maine. The owners, by agreement with the salvors, held an auction sale of the wreck, and paid salvage on the amount realized, which was \$1,250. The assessor's report tended to show that the schooner was bought by one Jackson, who raised her, and took her to a port about four miles off, where there was a marine railway, and there repaired her at a cost of about \$1,300, making with the prime cost at the auction sale \$2,550; and that she was worth, after repairs, about \$4,000. There was some conflict in the evidence of value before the loss. The assessor found it to have been \$4,500, which agreed substantially with the estimates of the present owners.

E. D. Sohier & C. H. Drew, for the claimants. The damages

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should have been assessed on the principles of a partial loss. *The Catherine*, 17 How. 170.

J. C. Dodge, for the libellants.

LOWELL, J. There is no doubt that the schooner was necessarily abandoned, and, if she had never again been heard from, the assessment must have been for a total loss. As she was brought in and repaired, the case is said by the claimants to be governed by *The Catherine*, 17 How. 170. There is, besides, *The Granite State*, 3 Wall. 310. These cases carry the doctrine very far, that, when a vessel can be repaired, the measure of damages is the cost of the repairs. Indeed, the later of them seems to say that this rule may apply even if the vessel is wholly lost; but the report is meagre, and this cannot be the meaning. The injured vessel may be in a place where repairs will be very difficult or very expensive, or where the master or owners cannot obtain the necessary funds. In short, the law must be, that whenever a prudent, uninsured, and unindemnified owner would sell a vessel injured by collision, she may be sold at the risk of the wrong-doer; and that the result to the purchaser cannot affect the damages, except as it may go to show a want of good faith in the sale.

An owner has no right to repair at the expense of the defendant in a collision cause, unless when a prudent owner would repair; and damages in such a case were limited to the amount of a total loss, although the repairs had cost much more. *The Empress Eugénie*, Lush. 138. I have had a similar case, which was affirmed on appeal, *The Glaucus*, 1 Lowell, 366, in which I gave a little more than a total loss, under the peculiar circumstances, but without impugning the general rule. This being so, it must follow that if the expenses of repairs will exceed the amount of a total loss, the owner may recover for a total loss; and it may be that where he honestly and prudently makes up his mind that the vessel is not worth repairing, he need not repair, but may sell and recover his whole loss. I understand that these qualifications are admitted in the recent case of *The Baltimore*, 8 Wall. 388.

But the owner must act with entire good faith and reasonable skill and prudence, else the loss which he seeks to recover may

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be due in part to his own conduct, and so cannot be assessed against the trespasser. There must be a necessity for the sale, like that, for instance, which would justify a master for selling his ship in a foreign port. I must say that I do not find such necessity to have been present here, nor even to have been supposed to exist. The managing owner seems to have determined on the auction sale for reasons of convenience, and as an arrangement between the owners and salvors, rather than with any regard to the questions now presented. It was, perhaps, thought that an auction sale is a fair and conclusive test of value; and it was undoubtedly accepted as such by the salvors; but they may have had reasons for haste in disposing of this matter, in order to continue their voyage, or for some other reason. Now, I suppose it is very rare that a wreck lying on shore, and especially in a place where the extent of the damage cannot be seen, will bring its exact value. It may be more or less; but it is not one of those things that have a commercial standing; the bids must be very much a matter of speculation. If the wreck is worth raising, it will usually, I suppose, bring less than its true value. At all events, I am prepared to say, that when the owners are in a situation to repair the vessel, if she shall be worth repairing, they ought not to sell her, excepting at their own risk as to price, without a full examination into her condition. The managing owner swears, in this case, that, when he was bidding on the wreck, he supposed the injury to the timbers, &c., to be much greater than it was; and this is enough to show the impropriety of his course, so far as it affects the defendants, who had no notice of the sale, and who, as appears by the evidence before the assessor, had already declared their intention to do what was right in the premises. I hold, therefore, that the owners were wrong in not raising and examining the vessel before they undertook to fix her value by a sale. It is said that they were unable to raise her; but the buyer does not seem to have encountered any special difficulty in that respect. The salvors had no right to object to her being raised and examined, and do not appear to have offered any opposition to it. The circumstances bring the case within what I suppose to be the decision in *The Catherine*, and the loss must be assessed as partial.

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I cannot agree with the claimants, that, in making up a partial loss, the allowance for salvage will be only what was actually paid to the salvors. That payment was based on the sale, which cannot be affirmed in part and annulled in part. It is fair to assume, that if the vessel had been known to be worth more, the salvage would have been higher. In making up the damages on a theoretical basis, the owners must have the advantage of this difference.

The witness to demurrage estimates it at \$18 a day; but he says, at the same time, that eight cents per ton of carrying capacity is the rate always stipulated for in the coal trade, which is a very large business, and employs a great number of vessels of the class of the Susan Ross; and, as her tonnage for coal is said to be one hundred and eighty tons, this would make \$14.40 a day, if the vessel were manned; from this must be deducted whatever the expense of the crew would be, which, I should suppose, would reduce the cost nearly one half. I was not asked to assess the damages, but only to recommit the report, if a new assessment should be necessary. I only give my views as an approximation and a guide to the assessor.

Pro Forma Assessment.

Cost of repairs made	\$1,800
Damages not repaired	400
Demurrage for four weeks, at \$8 per day	224
Salvage (estimate)	1,250
	\$3,174

I do not know precisely what the damages will prove to have been, but I should suppose the above estimate a liberal one.

Report recommitted.

NOTE. — The rate of demurrage above allowed has been often agreed upon for vessels of this class in collision cases.

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SAWYER v. TURPIN.

AUGUST, 1871.

A conditional contract to deliver goods to a trader, upon payment for them, gives his general creditors no interest in them, unless there is a surplus, and therefore an arrangement to carry out such a contract is not fraudulent.

A change in the form or even the substance of a security, within four months of bankruptcy, is protected, if the first security was unimpeachable, and no greater value is given the creditor than he had before.

It is well settled that a trader who cannot pay his debts as they mature in the ordinary course of his business, is insolvent; and that if he, knowing his inability, within four months of his bankruptcy, give security to a creditor who has reason to believe it, he makes an illegal preference.

TWO BILLS IN EQUITY by the assignee in bankruptcy of J. C. Bacheller, of Lynn, against Novelli & Co., of Manchester, England, and their agent in this country, E. Turpin, alleging that at certain times mentioned, and all within four months before the bankruptcy, Bacheller, being insolvent, made two mortgages of certain lands in Lynn, and a third mortgage of a house standing on leasehold land, and certain transfers of goods of the alleged value of \$20,000 in gold, then in the bonded warehouses of the United States at Boston, to said Turpin, as agent for Novelli & Co., with intent to prefer said last-named defendants, they and their agent believing, and having reasonable cause to believe, that Bacheller was insolvent and intended a fraud on the act. The answer admitted that the mortgages were made as security for a large balance of account for goods sold, but denied all belief in or reason to believe the insolvency of Bacheller, and averred that two of the mortgages were given instead of two earlier conveyances of the same property, which had been made more than four months before the bankruptcy, and which were cancelled when these now in controversy were given. As to the goods, the answers admitted that transfers were made by Bacheller to Turpin, as agent of his principals, on the books of the custom-house, and set out the several dates thereof, and averred that the goods were on their way from Novelli & Co. to Bacheller when the sales were lawfully rescinded before the property had

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ever vested in Bacheller, and, if the re-transfers were not valid, there was a right to stop the same goods *in transitu*, and that said goods had not been delivered to Bacheller at the time of his stopping payment.

The evidence tended to show that Novelli & Co. had, for some years before July, 1868, dealt largely with a firm of which Bacheller was a member; and when he began business by himself in 1868 he continued to send them large orders for goods such as he had always dealt in. The terms appear to have been that each invoice was to be remitted for within sixty days from its date.

Early in 1869 Bacheller was largely in arrears to Novelli & Co., and continued to be so until his failure. He stopped payment in September, and filed his petition on the 22d October, 1869, the defendants appearing by his schedule to be creditors to the amount of about \$41,000, and holding the securities mentioned in the bills. All his other debts were about \$6,000.

It appeared that in April, 1869, Novelli & Co. wrote to Turpin, expressing their dissatisfaction with the state of Bacheller's account, and directing him, on receipt of the letter, to proceed at once to Boston, and, if there was still an overdue balance, "to induce, request, or insist that he hands over to you as collateral security the notes and such other documents of value you can by any means obtain, to be held by you in safe-keeping until such time as he can cover our overdue balance by remittance." They afterwards, in the same letter, say that they consider "the position of J. C. B.'s affairs are not, in a commercial point of view, satisfactory," and state their reasons. On receipt of this letter Turpin went to Lynn and saw Bacheller, and obtained from him conveyances of the land on Bacheller Street, and of the shop on Exchange Street, and a transfer of certain goods in the custom-house, as collateral security. And at the same interview it was agreed that all goods that should arrive thereafter should be warehoused in Turpin's name until they were sold by Bacheller, when Turpin should send withdrawal orders, and Bacheller should deliver the goods and remit the proceeds. This course of business was followed from that time, excepting that the remittances were made on account, without special reference to any particular

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sales. Goods were so transferred to Turpin in May, June, August, and September, as they arrived, and were re-transferred by him as they were sold. When Bacheller stopped payment in September, there were — cases thus stored in Turpin's name, for a part of which he had sent on withdrawal orders, which, on the failure, were sent back to him; and on the 14th of October he took the goods out of bond, paying the duties and charges, and caused them to be sold. At the time of his failure the bankrupt's debt to Novelli & Co. was as large as it was in May. On the 27th of July Bacheller handed to Turpin the mortgage of the house on Atlantic Street as additional security. On the 31st of July Turpin brought the deeds which he had received in May to Mr. Bacheller's clerk, who was to have them recorded; and the clerk said that it would be better to make some change in their form, and accordingly made out the mortgages which bear date 31st of July, and were recorded in September. The delay for a month or more in recording the deeds was an oversight on the part of the clerk. The title to the Bacheller Street property proved to be defective, and the defendants realized nothing from that mortgage, so that the discussion was eventually confined to one mortgage of lands and one of personal property.

J. G. Abbott & B. Dean, for plaintiffs. 1. Bacheller was insolvent in May, and ever after, according to the accepted definition; for he could not pay his debts as they matured. *Thompson v. Thompson*, 4 Cush. 127; *Lee v. Kilburn*, 3 Gray, 594, and cases cited.

2. The defendants had notice of the insolvency, because their own debt was overdue, and they were unable to obtain payment. All the correspondence shows this to be so; and, besides, they were obliged to take security on real estate for a balance which should have been liquidated as fast as it accrued.

3. The defence that the new mortgages were given in exchange for the old, fails, because one was given for the first time July 27; another was for a bill of sale which was void, never having been recorded and no possession taken under it; and none of them were ever acted on.

4. All transfers of merchandise made within four months of Oct. 22 are void, because they were given to secure an ante-

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cedent debt, when the debtor was insolvent, and known to be so. The arrangement cannot be dated back to May, because a mere executory contract for security does not suffice. This has been repeatedly decided by the supreme court of Massachusetts. *Forbes v. Howe*, 102 Mass. 427 ; *Blodgett v. Hildreth*, 11 Cush. 311 ; *Paine v. Waite*, 11 Gray, 190 ; *Simpson v. Carleton*, 1 Allen, 109 ; *Denny v. Dana*, 2 Cush. 160.

5. The right of stoppage cannot be set up, because the defendants asserted a wholly different and inconsistent title, under a new arrangement, by which the goods were to be held as security generally.

J. D. Ball, for the defendants. 1. The weight of the evidence is that the defendants had no reasonable cause to believe the debtor to be insolvent, until he actually stopped payment in September.

2. All but one of the mortgages were mere changes of security, which is valid: *Stevens v. Blanchard*, 3 Cush. 169.

3. All the goods now in controversy, excepting one case, were transferred on their arrival simultaneously with the receipt by Bacheller of the bills of lading and invoices from Turpin, and therefore they were conveyances of property which but for this arrangement the defendants would have withheld. It is like the instantaneous seizure which takes place when one mortgages back land to secure the payment of the purchase-money, which, if done as part of the same transaction, gives the wife of the vendee no right of dower excepting in the equity.

At all events, we had a right to stop the goods in the bonded warehouses in September, for the transit was not ended. *Northey v. Field*, 2 Esp. 613 ; *Burnham v. Winsor*, 5 Law Reporter, 507 ; *Donath v. Broomhead*, 7 Barr, 301 ; *Mottram v. Heyer*, 5 Denio, 629 ; *Harris v. Pratt*, 17 N. Y. 149 ; *Winks v. Hassall*, 9 Barn. & Cress. 372 ; 2 Kent's Com. 547.

The fact that Bacheller had transferred the goods to Turpin did not affect the right of stoppage *in transitu* as an independent right. *Naylor v. Dennie*, 8 Pick. 198 ; *Scholfield v. Bell*, 14 Mass. 40 ; *Grout v. Hill*, 4 Gray, 361 ; *Feise v. Wray*, 3 East, 93.

LOWELL, J. The thirty-fifth section of the bankrupt act, so far as it relates to preferences, has not, as yet, been fully construed

by the supreme court of the United States; but its meaning is in most particulars as well established as it can be until it has passed that final ordeal, because the lower courts have been remarkably harmonious in their decisions upon it. A trader is insolvent within the meaning of that section when he is unable to pay his debts as they mature in the ordinary course of his business, and not merely when his liabilities exceed his assets. The Massachusetts decisions under the law of that State have approved themselves to the judgment of the courts that have had occasion to pass upon this part of the United States statute, which is borrowed from that of Massachusetts, and is presumed to have been enacted with a full knowledge of its accepted judicial interpretation. It is equally well settled that when a trader is insolvent, and knows it, and expects or fears that he may at some future time be obliged to stop payment, and gives security to one creditor, he must be presumed to intend to prefer that creditor, because this is the necessary result of his conduct, if what he expects or fears may happen does come to pass. And it does not disprove this intent to show that other motives may have co-operated to induce the act, such as the pressure of importunity or threats, or proceedings at law on behalf of the creditor so benefited. And if the creditor believed, or had reason to believe, in the insolvency of the debtor, and that the security would be likely to make a preference, the case is complete, if bankruptcy occurs within four months. This state of law was assumed in the argument on both sides in this case, and the facts were discussed in view of it. Upon careful consideration, I find it impossible to doubt that Bacheller was insolvent in the technical sense on the 6th of May. The correspondence and other evidence which the defendants have furnished with the utmost frankness prove that they had reason to doubt his ability to pay with punctuality, and that they did doubt it, though they may have had full hopes of ultimate payment. They were aware that he was constantly in arrears to them, and that his excuses were unsatisfactory, and they feared he was over-trading and speculating, which the event confirms. Under these circumstances, security is taken at the risk that bankruptcy may intervene within four months.

As Bacheller did not petition until the 22d of October, it is plain that the arrangement of May 6 cannot be impeached. And the defendants insist that all the transfers of goods in bond, and all but one of the mortgages, were made in pursuance of that arrangement, and date from that time. The plaintiffs contend, on the other hand, that a mere executory contract to give security is of no avail, unless the transaction is completed more than four months before the bankruptcy, and that each deed or assignment dates from the time it was made, and not from the time it was agreed to be made. To the cases cited for this doctrine may be added *Arnold v. Maynard*, 2 Story R. 349, and *Bank of Leavenworth v. Hunt*, 11 Wall. 391. Whatever may be the proper limitations of this rule under the bankrupt act, the rule itself does not apply to the several assignments of goods in bond, because the agreement of May 6 was not so much an undertaking to give security upon property to be thereafter acquired, as a new contract, by which the deliveries of goods by seller to purchaser were to be conditional, so that Bacheller never acquired the title to these lastings excepting under the terms of the new arrangement, and his creditors had no interest in them, unless there should be a surplus after paying the balance due the defendants. If this is the fair construction of that agreement, it can only be impeached by evidence that the goods were already so far vested in Bacheller that there was no consideration for the promise excepting the old debt; and such I understand to be the argument for the plaintiffs. But the proofs are, that the course of dealing, even before May 6, was to send the invoices and bills of lading to Mr. Turpin; and I see no reason to doubt, that, if this new arrangement had not been made, he would have had the right to withhold the lastings not yet delivered, until his account should be paid. It follows that a contract for their conditional delivery gives no just cause of complaint to Bacheller's creditors.

So, if security by way of mortgage was given in May, a change in the form, or even in the substance, of the deeds made within four months of the bankruptcy would be protected, if no greater value were put into the creditor's hands at that time than he had before. This is admitted; but it is urged that the bill of sale of

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the house given in May was void, and could not form a legal equivalent for the mortgage of July. The facts on this part of the case are not entirely clear, because the original bill of sale cannot now be found. It appears to have been drawn up by the bankrupt's clerk, and his impression, as well as Mr. Turpin's, is, that it was not in form a mortgage. Still, it was given and received as a valid security between the parties; and I am not prepared to say that it is shown to be void. The change of securities was considered to be a mere change of immaterial matters of form, without the least intent to vary the rights of the parties or of creditors; and I am of opinion that I cannot, in the present state of the evidence, undertake to say that the surrender of the bill of sale was not a sufficient consideration even as against creditors for the mortgage on the same property. Since the decision in 11 Wallace, above cited, I cannot but feel some doubt whether the supreme court would recognize the validity of an unrecorded mortgage of chattels; but my own opinion has been given in its favor, and that case does not necessarily overrule it. That point, however, is unimportant, because the bill of sale might have been recorded at any moment. The mortgage of the house and land on Atlantic Street stands differently. It was given for the first time July 27, and was not in exchange for any thing; and the debtor was then embarrassed, and was known by the defendants to be so. I do not recapitulate the evidence. It would seem that Bacheller must have had debts besides those contracted in his regular business, and it may be that the payment of some of those debts is still more objectionable in the view of the bankrupt law than any dealings with Novelli & Co. But with this I have no concern at present. That he was insolvent in July, and that the defendants had reason to believe him so, I am constrained to hold, upon the evidence exhibited in the record. The result is, that the money realized from the mortgage of the land on Atlantic Street must be accounted for to the assignees. The proceeds of sales of the goods and of the shop belong to the defendants.

*Let decrees be entered accordingly.*¹

¹ Affirmed, 1 Holmes, 226; 1 Otto, 114.

Frates v. Howland.

JOHN FRATES & AL. *v.* EDWARD W. HOWLAND.

August, 1871.

The stipulation which was introduced some years since into the usual form of shipping articles for whaling voyages, that the owners shall have the right to ship catchings home, on freight, is beneficial to both parties, and is valid.

When such catchings had been shipped home, and the owners in good faith and in the exercise of their best judgment had kept them, unsold, hoping for a rise in the market, — *Held*, they were not bound to account for them at their value when they arrived.

Whether, after receiving such catchings, they would not be bound to stop any charges for interest on advances to the seamen, *quere*?

WAGES. — WHALING VOYAGE. — The thirteen libellants were part of the crew of the ship Cornelius Howland, on a whaling voyage, which was prosecuted mainly in the Arctic Ocean. The ship left New Bedford in November, 1867, and returned in May, 1871, having shipped home by other vessels the oil and bone taken in the seasons of 1868 and 1869, most of which remained unsold at the return of the vessel. The shipping papers contained an article which was introduced into these contracts about fifteen years ago, and is now printed in all of them, as follows: "It is understood and agreed that the master shall have the right to ship catchings home or elsewhere at any time during the voyage, and that the net proceeds, after deducting freight, insurance, and expense incident to the sale and settlement of the same, shall bear interest from and after the sale until the termination and making up the settlement of the voyage." And that if the ship herself earns freight, it shall be divided proportionately in like manner with the catchings. It was proved that the season in the Arctic Ocean was so short, and the distance from New Bedford so great, that this kind of whaling could not be prosecuted to advantage from that port without the power of shipping home the catchings, which enabled the vessel to follow the business for several successive seasons before returning home. Upon the articles, the lay of each seaman below the rank of boatsteerer was entered as the three hundred and fiftieth; but the pleadings set up, and it was admitted to be true, that every one signed an additional

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paper, which was annexed to the articles, by which it was agreed that if he should satisfactorily perform his duties on board the ship, and return in her to New Bedford, there should be paid to him, after deducting seventy-five dollars, but not deducting any charge for fitting, discharging, or interest on the home bill, the difference between the lay mentioned in the articles, and a much better one mentioned in this contract. The questions argued at this time were, whether the owners were bound to account for the catchings which had been sent home at their value when they arrived, which was much greater than it was at the return of the ship; and whether the crew were bound to submit to the deduction of seventy-five dollars, in accordance with the special contracts. The catchings had been kept on hand for a rise in price.

G. H. Palmer & C. T. Bonney, for libellants. The catchings were sent home for sale, and should have been sold within a reasonable time, or at all events credited within a reasonable time, so that they might bear interest.

The stipulation that seventy-five dollars shall be deducted from the agreed lay is void.

E. L. Barney, for respondent. The owners of the ship may exercise their best judgment in deciding upon a sale. The object of the shipment is not so much for sale, as for enabling the vessel to continue her voyage in the best manner. The owners may be likened to trustees, who are bound to exercise their best discretion.

The seventy-five dollars is instead of the usual charges.

LOWELL, J. I am not aware of any law which requires the original contract of seamen in the whaling service to be in writing; because the voyage is not "foreign" within the act of 1790: *Taber v. United States*, 1 Story, 1; *The Atlantic*, Abb. Adm. 451; Curtis on Merchant Seamen, 60. But the statutes of April 4, 1840, and July 20, 1856, which concern the treatment of seamen on a voyage, and their discharge, and even the shipment of men in the course of the voyage, as well as the return of seamen to the home port, are applicable to this branch of business: *Bates v. Seabury*, 1 Sprague, 433; *The Antelope*, 1 Lowell, 130; *The Louisa A.*¹ So that if there is a written contract, as there always is and should

¹ Decided in this court, September, 1870.

be, the act of 20th July, 1840, requires a true copy of it to be taken by the master ; and this is, for all consular purposes, conclusive evidence of the contract, and regulates the dealings between the parties in the course of the voyage ; and men shipped during the voyage, if shipped at a consular port, have the right to require a compliance with the eighth clause of the act. In this case the paper signed by the foremast hands did not state their contract truly ; and although there may have been no necessity that the men should sign articles, yet it was fraudulent conduct on the part of the agent to induce them to sign two different contracts, one of which only, and that the false one, was furnished to the collector and carried on the voyage. So far as the parties are concerned, the objections to such a course are many. A seaman might be disabled, or might be discharged at a foreign port by consent, and the consul could not know how the settlement should be made with him. The reason given in the argument, that the owner in case of desertion would be bound to pay the forfeited wages to the United States, and wished to deceive them, does not recommend itself very strongly to the consideration of a court of justice. It was testified that owners sometimes promise a slightly increased lay, on conditions like those found in this contract, as a premium for good conduct ; and I do not know that there is any objection to this, if done in good faith, and if the original lay is a fair and honest one agreed to by the parties. But the same intelligent witness who spoke of this custom, had never heard of any such difference as that between one three hundred and fiftieth and one two hundred and tenth, nor of any real lay as small as the former. It is plain that the shipping articles are a mere fiction in this particular.

Under these circumstances, I must, of course, construe these special contracts, made for the exclusive benefit of the owners, most strongly against them, and set aside any conditions that may be oppressive.

Both parties have agreed, that, for the purposes of this case, the lays mentioned in the special contracts are to be the basis of settlement ; but the men dispute the deduction of seventy-five dollars. It appears that this was in lieu of certain charges, which are said to be usual ; namely, for fitting and discharging the ves-

sel, and for interest and insurance on the advances. Judge Sprague has repeatedly disallowed all of these charges excepting interest; and I do not see how I can allow them, unless it shall appear that some changes in the shipping articles or in the course of trade have changed the aspects of the question, which I neither affirm nor deny, for I am not informed upon the matter. I should be glad to have all questions of charges carefully examined before the assessor, if the parties are willing to assume the burden. See *Lovrein v. Thompson*, 1 Sprague, 355; *Bates v. Seabury*, id. 433.

The other question is one of great importance and of some difficulty. The evidence shows, and the libellants admit, that what is now art. 9 of the ordinary contract, authorizing the master to ship home oil and bone, is useful and advantageous to all parties, if, indeed, it is not essential to the prosecution of the particular sort of enterprise undertaken in this case; and I have recognized its validity in former cases. The decision of Judge Sprague, that under the older form of contract all such shipments were at the risk and expense of the owners, may have led to the change. But the question now arises for the first time, whether the owners are bound to sell the oil and bone on its arrival. It has been repeatedly decided by my predecessor, and by me, that the owners must account for the oil brought home, on its arrival, and cannot wait for changes of market. The main reason for this decision is, that the seamen cannot wait the issue of the mercantile enterprise after their own part in it is ended. Their right is to wages regulated by the catch, and these wages are payable on the return of the vessel. The owners retain the property in the oil, and need not sell it, if they account for it at the cash value. Under the ninth clause, the oil and bone are to be shipped home for sale; but is there any time at which the sale must be made short of the return of the vessel, or other termination of the voyage? Upon reflection, I am not able to fix any time short of that. The main purpose of this clause appears to be to exclude the conclusion that the owners are bound to get the oil home at their own expense; for there is coupled with the agreement that they may ship oil on freight, the further stipulation, that if their vessel earns freight in a similar way the seamen

shall share it. The owners have a certain quantity of oil which they might, perhaps, bring home, but which it is convenient to send home. I should probably hold that they were bound to insure it, and that, if lost, they must account for its value. But when it reaches home, it seems to me they may hold it as part of the proceeds of the voyage, if in good faith and in the exercise of their own best judgment they deem it wise for all parties to do so. It is not a consignment; and the seamen would, perhaps, have no right to order the owners to sell or not to sell; though this I do not decide. If instructions were sent on, the owners would be likely to follow them, because the seamen could not then complain of the result. When the market is falling, as has now been the case for five years, the result of holding is most unfortunate. But on a rising market it would be different, and I must fix some definite and absolute rule. Either they must always sell, or they may always control the matter. I cannot see my way to the decision that they must do the former. The argument was much pressed, that one consideration operating with the seamen to accept art. 9 as part of their contract was, that a fund was thus put into the owners' hands to stop the charges of interest and insurance upon the advances. I admit that there is force in this argument; and it may be that the interest and insurance on advances, if otherwise valid, ought to cease from the time that the owners have in their hands any oil or bone from which they might have reimbursed themselves, if they had chosen to do so. This is one of the points which may come up hereafter.

Interlocutory decree for libellants. Wages to be assessed.

THE ONTARIO. — THE HELEN MAR.

AUGUST, 1871.

- A whale-ship in the Arctic Ocean, which had been twice refitted at San Francisco, after the statute of 29th April, 1864, concerning collisions, was passed, and which could have procured the colored lights at that port, — *Held* in fault for not having such lights, though her master had never heard of the statute.
- A vessel having the right of way in the night-time, and not having the statute lights, is presumed to be in fault in respect to a collision with a vessel that should have seen her and given way.

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The vessel bound to give way is likewise in fault, if by diligence and attention her lookout might have discovered the vessel that had not proper lights.

Where one of the ships damaged by a collision was abandoned in the Arctic Ocean, under a reasonable apprehension that the lives of the crew would be endangered by trying to save her, — *Held*, her loss should be assessed as a total one, though the other ship similarly damaged was saved.

Under the statute limiting the liability of ship-owners, the outfits of a whaleman are part of the appurtenances of the ship in estimating value.

Under the same statute, there is no freight pending in a voyage for catching whales.

CROSS-LIBELS for damage by collision between the whale-ships Ontario and Helen Mar, in the Arctic Ocean, Sept. 26, 1866, at ten o'clock at night. A gale was blowing from the north-west, and both vessels were lying-to under storm-sails. They were bark-rigged vessels; and, according to their several pleadings, the Ontario was close-hauled on the starboard tack under close-reefed main topsail and foretop-mast staysail, and the Helen Mar was close-hauled on the port tack, having set her lower main-topsail, fore-staysail, and foretop-mast staysail. Each vessel was making from one and a half to two and a half knots, a considerable part of which was to leeward. The libel on behalf of the Ontario alleged that the night was bright moonlight, with occasional snow-squalls, and that the men of the Ontario saw the Helen Mar about half a mile off, and expected her to give way. The owners of the Helen Mar pleaded that there were thick snow-squalls, with intervals of clear weather; that there was a good lookout, but it was impossible to see the Ontario in time to avoid her, she having no sufficient lights.

The starboard sides of the vessels came together, and each lost the foremast and main and mizzen topmasts and head-gear, besides the anchors, and all boats but one. The Ontario was abandoned, and the loss to her owners was alleged to be \$150,000. The Helen Mar was brought out of the Arctic Ocean, and reached San Francisco in safety, with a damage pleaded at \$20,000. She made several more cruises, and reached New Bedford in 1870. Witnesses were examined from time to time, as they arrived in this part of the country, and a few were produced in court; others could not be found. It was admitted that the Ontario had not the red and green lights required by law, Captain Barnes being ignorant of the statute. On her part it was

contended that she carried a bright light in the lee mizzen rigging, and ought to have been discovered sooner, and, having the right of way, should have been avoided by the Helen Mar.

Two men were stationed amidships on the Helen Mar as lookout men, — one on the main hatch, and one on the vice-bench, just forward of that hatch, and raised several feet above it. This man was not examined; and it was proved that efforts had been made to find him, without success. The other man testified in court that he saw a light on the lee bow, and reported it to the second mate. The second mate, Mr. Shiverick, swore that immediately on the light being reported he went to the waist, but could see nothing; that he then ordered the wheel hard up and the main yard to be squared, and then went immediately to the bow and saw the light of a vessel not more than a ship's length off, and heard a voice on board of her say, "Hard up that helm," which he supposed to be addressed to the men of the Ontario. He thereupon ordered his own wheel to be put down again, and very soon afterwards the vessels came together. He said that the effect of his last order would be to ease the blow if the Ontario was falling off, as she had every appearance of doing; thinks they would have come together head and head if he had not given this order. This witness said, that during the snow-squalls it was dark, and between the squalls it was light, so that you could see a vessel for about half a mile. He afterwards said there was a kind of blur on the water, from the blowing of the water, and that he thought a vessel without lights could be seen about a quarter of a mile off at the time of the collision. He also said, that when he went to the bow he saw the Ontario, though by this he may have intended to refer to her light. The lookout confirmed substantially the evidence of Mr. Shiverick, excepting that he heard nothing from the other vessel, and he thought the light was about four points off the lee bow. The people of the Ontario denied that any change of her course was made at any time. They represented the weather as bright and clear for some time before the collision. Some of them swore that the moon was shining.

T. M. Stetson & O. Prescott, for the Ontario. We admit that we had not the lights, but we had one nearly or quite as good, which ought to have been seen. The obligation to keep a good look-

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out was as strongly resting on the Helen Mar, as that of showing a light rested on us. We could do nothing more than we did; and, the weather being such as it was, the fault lies with the other vessel, for the night was bright in the intervals of the slight snow-squalls.

Upon the evidence it was prudent and proper to abandon our vessel. There was great danger of losing both ship and crew at that season of the year in the Arctic Ocean.

To the point that the want of regulation lights must have been the operative cause of the collision in order to affect the decision, see *The Gray Eagle*, 9 Wall. 505; *The Eclipse*, Lush. 422; *The Flavio Gioja*, 3 Mitch. Marit. Reg. 757; *Morrison v. Steamship Co.*, 20 L. & Eq. 455.

If the night was clear, the Helen Mar should have seen us. *The Niagara*, 21 How. 7; *Whittredge v. Dill*, 23 id. 451; *Union St. Co. v. N. Y., &c. Co.*, 24 id. 314. A case almost exactly like this is *The Cynosure*, 7 Law Reporter, 222. We could not have justified a departure from the duty of keeping our course by any inference that the Ontario would not do her duty, but were bound to keep on, as we did. *Bentley v. Coyne*, 4 Wall. 509; *The Fairbanks*, 9 id. 425; *The Dumfries*, Swabey, 126.

G. Marston & W. W. Crapo (*C. W. Clifford* with them), for the Helen Mar, cited *The Osprey*, 1 Sprague, 245; *The Lion*, id. 40; *The Rob Roy*, 3 W. Rob. 190; *The City of London*, Swabey, 245; *The Calla*, id. 465; *The Livingstone*, id. 519; *The City of Paris*, Holt, 15, 22; *The Gustav*, id. 28, 34; *The Lady of the Lake*, id. 37, 38; *The Smales*, id. 40; *The Eclipse*, Lush. 422.

LOWELL, J. The delay in this case seems to have been unavoidable by the parties, owing to the very great distance of the place of disaster from the home port of the vessels, and the dispersion of one of the crews; but it is much to be regretted. The contradictions of evidence for which this class of cases is noted have always seemed to me to be comparatively harmless, when the witnesses can be brought forward immediately after the event, so that their accuracy can be tested by those minute circumstances which escape with the lapse of time. Most of the leading facts of this collision are plain; but two or three matters of very great importance are disputed, and are not easily determined at this time.

I cannot doubt that the Ontario must bear at least one-half of the loss, because she had not the red and green lights. She had been refitted twice at San Francisco since the statute was passed, and it is not alleged that she could not have procured lanterns at that port, as the Helen Mar, in fact, did procure hers. No equivalent can be admitted for these signals, and, even if that were possible, the evidence does not show that the light used by this vessel was as powerful, or likely to be as useful, in giving precise information as the red and green lights would have been. Of the many cases arising under this and similar statutes there are very few in which the vessel having the duty to keep her course, and, therefore, to make known her presence, has been wholly excused when her lights were wanting, or were not of the required kind. If the night was so very bright that the lights would be of little or no practical use, or if the negligent vessel was, in fact, seen long before the collision, the fault might be held to be immaterial. The case of *The Palestine*, Holt, 52, seems to come under the former alternative. But such cases are rare; the presumption must always be that the statute lights are the best signals, and that the absence of them on the vessel whose particular province it is to give notice of her position must have contributed to the disaster.

The fault alleged against the Helen Mar is, that she did not see the Ontario, and avoid her, notwithstanding the want of the signal lights. The decision of this question depends on doubtful and contradictory evidence concerning the weather and the distance at which a vessel could be seen. The law requires great vigilance of the vessel that should give way, and the want of lights on the other vessel does not at all relieve this obligation. Art. 20 of the statute, 13 Stat. 61; *Chamberlain v. Ward*, 21 How. 548; *Nelson v. Leland*, 22 id. 48; *Rogers v. The St. Charles*, 19 id. 108; *The Gray Eagle*, 9 Wall. 510. However gross and palpable, therefore, may be the fault on one side, we are bound to examine into those alleged against the other. The question is very nearly this: Suppose the statute had not required these lights, were the night and the gale such as to excuse the Helen Mar for not seeing or for not avoiding the Ontario? I say the question is nearly the same, because I am not sure that something may not properly be conceded to the

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surprise of seeing a white light when you had a right to expect a colored one. I take for granted, as did both the counsel, that the Ontario had the right of way, because, although by the rule both were bound to port helms, yet the vessel that is absolutely close-hauled on the starboard tack can port no more without going in stays, which, it has been often decided, the statute does not require, unless, indeed, in very extreme cases. The Helen Mar, then, was bound to port her wheel and go to the right; this she did, but when the vessels were so near together that their meeting was not prevented. I do not lay much stress upon the fact that the wheel was put to starboard after it had been put to port; because it seems to be true, as alleged in the answer, that it was then too late to avoid the collision. And for the same reason I do not find the squaring of the Ontario's yard was of any importance. Her helm was not changed. The inquiry, therefore, is, whether there was any negligence in the lookout of the Helen Mar. The actual state of the weather, if we could ascertain it, would settle this point; but, in the contradictory state of the direct evidence, we are obliged to examine all the facts and circumstances which can give us any assistance. The Helen Mar had her wheel lashed, had but half her watch on deck, and her two lookout men were stationed nearly amidships. The testimony shows that these variations from ordinary rules are not unusual when a whale-ship is lying-to in that ocean in a gale of wind. The cold of even the month of September in that region is such as to require every care to be taken of the men; and they are often permitted, when there is not much work to do on board, to keep what are called quarter watches, by which each watch is divided, and every man is on deck only half the usual time. The great number of hands which whale-ships carry makes this possible, without imprudence. There were four men on deck besides the officer, two of whom were on the lookout, and two were near the wheel, which could be freed in an instant. The position of the lookout is said to have been chosen amidships, because water came over the bows and froze, so that men ought not to be exposed there, the ship having no top-gallant forecastle. There was evidence that the position was a good one for seeing a vessel to leeward, if the sail was such as is sworn to

on the stand by the officer of the deck and the lookout, namely, a foretop-mast staysail only on the foremast; but if there was a fore-staysail, as that would come below the rail, it would be likely to interfere with the view. Now it is a circumstance of some importance that the answer sworn to in May, 1868, and the deposition of the mate taken in September, 1867, and the deposition of the master, all say that there was a fore-staysail. Four of the witnesses from the Ontario, two of whom were examined early in the case, say they saw the sails of the Helen Mar, and three of them remember only a lower main topsail and a foretop-mast staysail, the fourth adds a fore-staysail. There was no close examination on this point, the importance of which was not then developed. The number of witnesses preponderates in favor of the present contention of the respondents; and yet very great weight must be given to the answer, which is supposed to be made with care, and to be the statement on which the other party has a right to rely.

I must hold it to be a doubtful question of fact, whether the vessel had not a fore-staysail. Then, the witnesses all agree that there had not been a snow-squall for some time, several of them on both sides say for fifteen or twenty minutes before the collision; and the decided preponderance of the evidence is, that between the squalls the night was so bright that a vessel without a light could be seen at least a quarter of a mile off. It appears that the lookout of the Ontario was in the bow, and that the hull of the Helen Mar was seen a considerable time before the collision; and there are several little circumstances which tend to show that the night was not very dark. When the Helen Mar was next refitted, a staging was put in her bow, to accommodate the lookout. Taking all these circumstances together, I am constrained to say that I think the Ontario or her light, or both, ought to have been seen sooner. I reach this conclusion with some reluctance, because the fault on the part of the Ontario was in the very appointments of the vessel, for which the owners and master are personally accountable; while the fault on the other part may have been the momentary carelessness of a sailor, after the responsible agents of the ship had done their duty in all respects. If, therefore, I could per-

suade myself that the night was thick, or even very dark, I should attribute the whole loss to the first fault, as was done in several of the cases cited by the respondents ; but the pleadings themselves, and the decided preponderance of testimony, convince me that at the time of the collision, and for at least fifteen minutes before, there was an interval of clear weather, in which the vessel or her light might have been seen ; and that there was a light in her mizzen rigging, though there is certainly a singular confusion in the testimony as to whether it was in the starboard or port rigging. I must order the damages on both sides to be added together, and each party to bear one-half of this aggregate loss.

The details of damage will be settled by an assessor ; but one point not less important than that just considered was argued at the hearing, upon evidence of the opinions of many most accomplished experts, as applied to the other facts in the case. In actions of *tort* "the direct and immediate consequences of the injurious act are to be regarded, and not remote, speculative, and contingent consequences, which the party injured might easily have avoided by his own act." *Loker v. Damon*, 17 Pick. 288. If, therefore, by reasonable prudence, firmness, and skill the Ontario might have been saved, her owners cannot recover for a total loss. *The Linda*, Swabey, 306 ; *The Pensher*, id. 211. But in a case of doubt and difficulty, if the master acts in good faith, his decision is of itself evidence of the necessity of the abandonment, and ought not to be lightly overruled. *The Flying Fish*, 2 Pritch. Dig. 705, tit. Registrar & Merchants, No. 171. And the master is not to be expected to risk the lives of his crew, or to possess a higher degree of skill and judgment than are usually found in men in that position. *The Blenheim*, 1 Spinks, 289 ; *Sherman v. Fream*, 30 Barb. 478.

In this case, the hull of the bark was not injured, and in the open ocean there would have been, I suppose, little danger to the crew, while her provisions held out. But she could not work to windward, and was in a sea which would be closed by ice before long, and the passage from which was somewhat to windward, and was considered dangerous and difficult. The master consulted with two other captains, one of whom was in the employ of the same owners, and made up his mind that the only prudent course was

to abandon his ship. The result attending the Helen Mar's attempt seems to show that this decision was unfortunate. Still I am not prepared to say that there was such a want of ordinary firmness and judgment that the loss should be thought to be too remote a consequence of the collision. The result of the very full evidence upon this head seems to be that expressed by one of the experts, — that many whaling masters would have made the effort. But, on the other hand, I think it is shown that it could hardly be less than a somewhat desperate effort, and one that many excellent captains would not be willing to make. Upon the whole, therefore, I am of opinion that the total damage actually sustained by the owners of the Ontario must be brought into the account.

Interlocutory decree that both vessels were in fault.

OPINION ON ASSESSMENT OF DAMAGES.

LOWELL, J. In assessing the damage suffered by the owners of the Ontario, the oil and bone which were lost in the Arctic Ocean have been estimated according to the rule laid down in *Bourne v. Ashley*, 1 Lowell, 27. Exception is taken to this mode; and as it differs from that adopted in *Taber v. Jenny*, 1 Sprague, 315, it cannot be considered as definitively established, until it shall have passed under review in the circuit court. In this case, the very large interests involved make it not improbable that the supreme court may eventually be called on to settle the important questions which are raised. All damages are more or less conjectural, unless when the subject is some article which has a value that is fixed, day by day, in the dealings of merchants or bankers, and the most reasonable and expedient rule must be imperfect. Upon a reconsideration of the case above cited, with the aid of the argument against it, I am unable to find any better rule, or one more likely to do justice in the general run of cases. It was argued that the price of oil and bone was exceptionally high at New Bedford at the time of the loss of the Ontario, and that, by making the assessment at that price, I should give the libellants what they never could have obtained in any possible combination of circumstances. There might be, and I think would be, a propriety in taking the average price for

a few days or weeks, rather than that of any one day, as fixing the supposed value of a cargo, in order to avoid any mere accident of the market. I do not understand that this would relieve the difficulty, nor that it has not in fact been done by the assessor. The argument goes further, and insists that if we take New Bedford prices, they should be such as the owners might by possibility have realized. It does not seem to me that any such modification of the rule can be adopted. The libellants had a thing in the Arctic Sea which would not have come home at that time, and perhaps never, and of which we must find the value then and there, as well as we may. Some of the evidence in *Bourne v. Ashley* tended to show that the oil and bone were worth in the Arctic Ocean what they were in New Bedford, after deducting the expense of getting it home. Nothing in the assessor's report here contradicts it. I suppose that, for purposes of sale, insurance, or any other contract, the owners of the cargo really had a property there of the estimated value, and, if they had been able to know the quantity, could have realized that value. It was suggested that the market price in New Bedford of the article at the time and place it was in is the true rule. This would be so if there were any such market price; that is to say, if such sales were made often enough to establish a tariff of prices. But there is no evidence of any such thing. If sales to arrive were often made, there is no reason to suppose, and no evidence, that any very material allowance would be made in them for subsequent fluctuations of the market.

Two most interesting and difficult questions of law have been argued in reference to the limitation of liability of the owners of the *Helen Mar*. I may as well say at the outset that the ship appears to have been appraised at her value before the collision, which is opposed to the decision in *Norwich Co. v. Wright*, 13 Wall. 104. Counsel were familiar with that case, and I understood them to say it had been followed; but I do not so read the assessor's report.

The other questions are: whether the outfit of the vessel is to be included in the valuation; and whether any and what freight is to be reckoned on her oil and bone.

The case of *The Dundee*, decided by Lord Stowell, and affirmed

by the king's bench under the presidency of Lord Tenterden, established the interpretation of the English statute 53 Geo. III. ch. 159, as including the fishing stores, as they are called in that case, of a whaler, among the appurtenances of the ship. *The Dundee*, 1 Hagg. 109; *Gale v. Laurie*, 5 B. & C. 156. In the trial at common law the jury found that by the usage of the trade such stores are not covered by a policy on a ship, her tackle, apparel, munitions, and furniture, and were not so covered at the date of the act of parliament; and the defence relied much upon that usage as proved, and as shown by the report of the case of *Hoskins v. Pickersgill*, 3 Doug. 222. In deciding the case in the admiralty the learned judge said:—

“It may not be a simple matter to define what is and what is not an appurtenance of a ship. There are some things that are universally so, things which must be appurtenant to every ship, *qua* ship, be its occupation what it may. But, I think, it is rather gratuitously assumed that particular things may not become so from their immediate and indispensable connection with a ship, in the particular occupation to which she is destined, and in which she is engaged. . . . Whether a whaler is originally built with any peculiarity of construction for that service is more than I know; but this is clear, that unless she has various appurtenances not wanted in other ships, as well as a crew peculiarly trained, she had better stay at home than resort to the Arctic regions, where alone her function can be exercised. A ship of war, public or private, has a special character, and it is a necessary consequence that she shall have special appurtenances. A packet, and particularly a steam packet, has its specialities. A Greenland ship is not a merchant ship, carrying out a cargo to be exchanged; she has character superadded by her special occupation, and must have the machinery adapted to the catching of whales, and to the dressing them, in part, on board the vessel.” 1 Hagg. 126.

The court of king's bench followed the same general course of reasoning, and in respect to the argument from the usage in policies said:—

“It is true that, in case of insurance, these stores are not considered as covered by an ordinary policy on the ship. But insur-

ance is a matter of contract, and the construction of the contract depends in many cases upon usage. The construction of a policy can furnish no rule for the construction of this act of parliament which was passed for purposes of a different nature." 5 B. & C. 164.

It cannot be denied that a great part of the discussion in both courts in the case of *The Dundee* turned upon the meaning of the word "appurtenances," which is used in the English statute, but is not found in our act of 1851. We hold the owner to respond only for the value of his ship and the freight then pending. The only question for me is whether this whaling outfit is part of the ship in the sense of the statute. In my opinion it is. I understand that a ship in that law includes her appurtenances. If not, I am at a loss to know where the line is to be drawn, and whether we are to appraise the sails, rigging, boats, furniture, and general fittings, or which of them. In the common speech of merchants the whole adventure of a vessel, in full employment, consists of ship, freight, and cargo. The whaling equipment has been decided not to be cargo, *Hill v. Patten*, 8 East, 373; and it certainly is not freight. The argument for the owners of the *Dundee* was, that "appurtenances" means no more than tackle, apparel, and furniture, and was used to save the repetition of those words; and as those words did not, in insurance law, include the equipment, the word "appurtenances" should be restricted in like manner. The courts, though dwelling, as was fit, upon the precise words of the statute, yet did not reject the premises of the defendants, but only their conclusion. They did not deny the pertinency of the citation, as giving a construction to appurtenances, if the question had been one of insurance, but only its effect in construing that word in a statute. In fact, there are two rules in the law of insurance: One, that in a policy on a merchant ship the outfit is included. The other, that in a policy on a fishing vessel it is excluded. The former rule was established by the courts; the latter, which may well enough be called an exception, is founded in usage. Phillips on Insurance, §§ 463, 496, 497, and cases.

Mr. Phillips, § 463, says that the usual form of policy in this country is simply on the ship, and that it is well settled that

on a policy for a commercial voyage this includes sails, rigging, boats, armaments, provisions, and all the appurtenances suitable or usual on such a voyage as is described; but that the rule is different in fishing voyages. This difference, as we have seen, had its origin in usage. No doubt, it is a reasonable usage, arising out of the great value of the outfit in many of these voyages; but in construing a statute of general application, we ought not to assume a different doctrine for different kinds of vessels, varying with the accidental variations of value in the outfits, and especially in a statute restricting remedies. This will hardly be maintained; and if not, then it only remains to ascertain whether appurtenances should be included or excluded in all cases. As I said before, it is the better opinion that the statute, in using the word "ship," intended to include her appurtenances.

It is much more doubtful whether it can be held that there was any freight pending on the voyage of the *Helen Mar*. Had it been a freighting voyage, the English statute in terms, and ours by construction, would have authorized the assessment to the owners of the value of the freight to them for the carriage of their own goods. Stat. 53 Geo. III. ch. 159, § 2; *Allan v. Mackay*, 1 Sprague, 219. In a whaling voyage the share of the catch which is retained by the owners has many analogies to freight, because it represents the earnings of the ship: *The Antelope*, 1 Lowell, 130. Still it has been decided not to be so far analogous to accruing freight as to pass by a sale of the ship, *Langton v. Horton*, 5 Beav. 9; and I do not doubt the soundness of that ruling. It is not commonly called freight, and it would be an unwarrantable stretch of construction to bring it within that word in the act. In *The Dundee* it was taken for granted in both courts by the learned and eminent judges who delivered the judgments, that there would be no freight in that case, even under the second section of the statute, which puts owners who carry their own goods upon an exact equality with those who earn freight from carrying the goods of others. They thought the point a clear one, and used it as an argument for including the outfit, that there was no freight in such a voyage. So far as the proportion of the oil and bone which is the share of the officers and crew is concerned, the

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owners are not benefited by its being carried to a port of delivery; and, on the whole, I think that there is no freight pending in a whaling or fishing voyage in the sense of the statute. If there should be held to be a constructive freight, it would be almost impossible to assess it, because in many of these voyages there is no place from which it can be reckoned. The whales are caught at various parts of the ocean, hundreds or thousands of miles apart, at various times during a period of from one to five years, and there would be in most cases no means of arriving at any thing like a fair estimate of a freight which never in fact exists.

I affirm the assessor's report as to all matters of fact found by him, and decide:—

(1) The *Helen Mar* is to be valued immediately after the collision, instead of before it, (2) with her equipment, (3) with no allowance for freight.¹

SUCHET MAURAN 2D v. GEORGE WARREN & AL.

August, 1871.

In a charter-party made by a master of a vessel at a foreign port, it was stipulated, that, if the ship should put into a port of necessity, she should be consigned to the charterers or their agents, who were to pay disbursements, charging two and a half per cent commission on the amount, take care of the cargo, and have general charge of the business of the ship.

Whether a master can lawfully bind himself to consign the vessel to any particular person in case of disaster, *quære?*

Where, in a port of necessity, the master did put his vessel in charge of the charterer's agent, — *Held*, the latter might properly require the master to produce his accounts when applying for money; such being the usage of the port.

Where the charterer had the funds ready, and kept them ready, to pay the disbursements, and the master broke off the negotiations and employed some one else, — *Held*, the charterer might recover, as damages, the commission agreed on.

By the terms of the charter-party this commission of two and a half per cent was to

¹ In the circuit court the decree in this case was varied by excluding the outfit from the value of the *Helen Mar*, and by assessing the value of the oil at the probable time of the vessel's return, if she had returned to New Bedford: *Swift v. Brownell*, 1 Holmes, 467.

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pay for all the services of the agent, and he could not charge five per cent, though the usage of the port was to make that charge.

Where the charterer's agent was to have a commission on freight at the port of discharge, this is to be reckoned on the freight received, and not on the gross freight list, some of which could not be collected.

Where an agent, in accordance with a usage of business, receives back from the average adjuster a part of the amount charged for his services, he must credit his principal with the amount of such discount or drawback. An agent is not to receive payment from both sides; and a custom to do so would be void.

AFFREIGHTMENT. — The libellant, residing at Providence, R. I., was the owner of the ship *Helen Clinton*, of which S. C. Sprague was master, who, in August, 1868, being at Liverpool, chartered the ship to the respondents, a firm doing business at Liverpool and Boston, for a voyage to the latter port. It was agreed, among other things, that the ship should be discharged by the charterers at Boston, who should collect the freight and averages, charging two and a half per cent commission on the amount; and that if the ship should put into any port before reaching her destination, she should be consigned to the charterers or their agents, "who are to pay disbursements, charging two and a half per cent commission on the amount of the same, take care of the cargo, and have general charge of the business of the ship." In the course of the voyage the vessel suffered damage, and was obliged to put back to Queenstown, where she was unloaded and repaired. The charterers were applied to by the master to furnish the money, and agreed to do so, and referred him to Messrs. James Scott & Co., of Queenstown, as their agents, who furnished him £200, and afterwards refused to make further advances. The agents testified that they were ready and willing, and offered, to make all necessary advances, if the master would send them his bills and accounts, as, according to their testimony, was the custom of the port in like cases. The master swore that the agents gave no reasons, but simply refused to let him have more money. There was a further conflict of evidence upon the question whether the libellant, who had gone to England on notice of the disaster, had made a new contract with the respondents varying the terms of the charter-party.

This libel was brought to recover a balance of freight; and the respondents claimed the right to retain the commissions which

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they would have earned at Queenstown, if the master had been supplied with funds, &c., by them, and certain charges and commissions said to be due them at Boston.

F. Goodwin, for the libellant. 1. The stipulation that the ship shall be consigned to the charterer's agent is *ultra vires*. The duty of the master at a port of necessity is to act on his own responsibility, for the benefit of all parties, and he cannot waive this right and duty. See *Pope v. Nickerson*, 8 Story, 476; *Hurry v. Hurry*, 2 Wash. C. C. 145; *The Sir Henry Webb*, 13 Jur. 639; *Warren v. Skolfield*, 104 Mass. 503.

2. We are not estopped, by suing on the charter-party, to set up that this charge is void, because, where an agent exceeds his authority, it is the excess only that is void. Story, Agency, §§ 166, 272.

3. The agents failed to perform the duties required of them.

4. If liable at all, it is only for two and a half per cent on the disbursements.

J. D. Ball, for the respondents.

LOWELL, J. In the case cited from the Massachusetts Reports, Warren & Co. acted merely as brokers, and the master appears to have given a gratuitous promise to consign the ship to them, which the court suggests is probably void. Here they were charterers, and had a right to say where the vessel should discharge, and their commission was part of the consideration for the entire contract. I must confess, however, that I have considerable doubts whether a master can bind himself to put his vessel into the hands of the charterer's agents at a port of necessity. But in this case he made the assignment after the disaster, when he had a right to do so; and his action seems to have met the approbation of the libellant, so that no question of *ultra vires* arises. All that I have to decide is, why the contract was broken, and whether the respondents are entitled to any damages which they can recoup in this action.

Upon the preponderance of the evidence, it seems to me that the true account is that given by the Scotts; that the master refused to show his bills. This is the only theory that reconciles nearly all the evidence, and indeed all, if we suppose that the master has forgotten the reasons given for the refusal. It seems

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a reasonable and proper precaution for the consignees to take, and is sworn to be usual at Queenstown, to require the accounts to be exhibited ; and the master ought not to regard it as any imputation on his honesty. I do not think it is shown that a new contract was entered into in this particular in the interview between the libellant and Mr. Warren. It is not likely that any such point should have been brought up ; and the statement of Mr. Mauran appears to be rather of a result, as it rested in his mind after the interview, than of the words, or even the substance, of the conversation ; and as the burden rests on him to make out this new contract, and as he is contradicted by Mr. Warren, and to some extent by the other respondents, I cannot hold that he has proved his new contract. Then the case is, that the respondents were ready and willing to furnish the money in the usual way, and, as they swear, kept it on hand for that purpose. It seems to me they are fairly entitled to the two and a half per cent on the disbursements. I remain of the opinion expressed at the hearing, that the true construction of the charter-party is, that they were to charge only this commission. There is evidence that five per cent would have been a reasonable charge, and was paid to the agent actually employed ; but this cannot overrule the contract, which agrees for the lesser commission. The respondents undertake to divide the usual commission, and to charge one half of it as the commission on disbursements, and the other half for general care of the business ; but the custom does not so divide it. If the usual charge had been two per cent, the libellants would still be entitled to two and a half ; and so they are when it is five or more. The evidence that an additional two and a half per cent would be a reasonable charge for the general conduct of the business, is only an argument founded on the fact that five per cent is the usual charge at Queenstown, and would be equally strong in favor of three, four, or five per cent, if they had been necessary to make up the usual charge at that port. If the case had been that the master applied to the respondents to do his business for the agreed commission, and they had insisted that they should charge the usual commission, he might well have refused to employ them, and would have had his action against them if he had been

obliged to employ some one else at five per cent. It is only on this ground that the contract can be understood, or perhaps supported, at all. But the evidence does not show that this was the cause of quarrel, and, upon the whole, I think they are entitled to their two and a half per cent. This seems to me the true measure of damages for not using the money which was ready and waiting.

The respondents have charged precisely what Dawson, the agent who was applied to, and acted, did charge; namely, five per cent on disbursements, £25 for care of cargo, and one per cent for indorsing the draft drawn by the master on Baring Brothers, at four months, for the amount of the disbursements. The measure of damages for not fulfilling the contract and not employing the respondents ought not to include one per cent for indorsing a bill which they never indorsed. It may be that they were to be paid by a bill on a banker, but the libellant would have been at liberty to pay them in some other way. They might as well add the interest for four months, which, I suppose, was added to the draft. For a like reason it seems to me the £25 ought not to be charged. It was for services not rendered, and does not come into the damages for not employing the respondents.

Coming to the charges in Boston, I understand the questions raised to be, —

1. Whether a commission is to be charged on the total amount of the general average loss, or only on that paid by the cargo and the freight. 2. Whether the commission is to be on the face of the freight bills, or only on the amount collected. 3. Whether the discount which the average adjuster allowed to the respondents from the face of his bill ought to be credited to the libellant, so far as his proportionate share is concerned.

The evidence is not sufficient to enable me to decide the first point to my own satisfaction. I do not know what part the respondents took in the adjustment, nor how these sums were in fact settled and collected. I will hear the case further on this point, if either party desires it.

The second point involves only a trifle, as I apprehend. The true rule is, that the libellant, by the terms of the charter-

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party, takes the risk of the solvency of the shippers; but if any freight cannot be collected, he is not to be charged a commission on it.

It is said to be usual for the adjuster to make some discount from his regular charge, for the benefit of the person who gives him the business. This is common in many trades and callings; but it is plain that, when an agent receives such a drawback, he must credit his principal with it. It is, in fact, a deduction from the bill; and he who pays the bill is entitled to it. I have known this question to come up in various forms, and in different courts; but the result has always been the same. The respondents are to have their agreed compensation from the libellant for doing his business, and the expenses. If they can get any work done at less than the market rate, he must have the reduction. It is precisely as if the agent at Queentown had received a commission from both sides, the libellant and the material-men. I know this is often done; but no court could sanction it as against the principal, and I have not been instructed that any court ever did sanction it. The libellant's proportion of the discount must be credited to him.

Interlocutory decree for libellant. Damages to be made up in accordance with this opinion.

Re THE MASSACHUSETTS BRICK COMPANY.

August, 1871.

The stockholders of a trading corporation agreed to lend money to the company in proportion to their several shares. One of them made the loan by giving his note, which the company indorsed, and agreed with him to provide for at maturity. They failed to take up the note when it became due, and the promisor paid it within fourteen days after its maturity. *Held*, that there had been no suspension of the commercial paper of the company for fourteen days.

Where stockholders were to advance money to the company in proportion to their interests, and did so advance it on a credit of four months, and all but one of them afterwards extended their loans for one year, in accordance with what the treasurer testified was an understanding at the time the loans were made, and the company paid all its trade debts as they matured, and was in good credit, whether it could be properly considered insolvent, *quære*.

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At a meeting of the stockholders, who were also the principal creditors of the company, it was voted unanimously to give a mortgage to one of the stockholders to secure him for advances made beyond his proportion. The petitioner, who was a stockholder and creditor, was present, and made no objection. *Hdd*, he was estopped to set up the mortgage as an act of bankruptcy by the corporation.

THE Massachusetts Brick Company was incorporated in May, 1869, for the purpose of manufacturing bricks in Somerville and Medford, with a right to have a capital stock not exceeding \$500,000, of which \$300,000 might be in real estate. The evidence tended to show that the capital stock had been fixed at \$400,000, of which about \$350,000 had been paid in, and that in July, 1870, it was found that so much of this had been invested in land and machinery, that the operations of the company were embarrassed for the want of active capital. Thereupon certain of the shareholders, of whom the petitioner was one, signed this agreement: "The undersigned, stockholders in the Massachusetts Brick Company, hereby agree to furnish the treasurer, in proportion to the amount of stock held by them, whatever money may be required to pay the present indebtedness, at ten per cent interest per annum, provided that not over \$75 per share shall be required on the amount subscribed to raise \$150,000 in full."

The petitioner accordingly lent the treasurer of the corporation \$5,000, and took the note of the company at four months, as did others. Some of the stockholders lent their notes on four months, and took a receipt from the treasurer that the company was to pay them at maturity. When the note held by the petitioner came due in December, 1870, he agreed to extend the loan, and lent the treasurer his note at four months, taking from him a receipt that the company were to provide payment for it at maturity, it being given for their accommodation. The petitioner offered evidence tending to show that he informed the treasurer that he should not renew the loan again, but should expect the company to pay the note at maturity, which would be the 4th of April, 1871.

The stockholders advanced different sums, not regulated precisely by the number of their shares, and Oliver Ames, the largest holder, advanced \$90,000, which was \$30,000 more than his proportion.

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The treasurer testified that there was an understanding among the contributors that the money should not be called for until the company should be able to pay it, and that they should all share alike.

Early in 1871, at an adjournment of the annual meeting of the stockholders of the company, at which the petitioner was present, Mr. Ames presented a proposition: That if a mortgage were given him for the excess which he had advanced above his share, he would "carry" \$60,000 for one year, if the other stockholders would do likewise. This proposition was accepted unanimously.

All the stockholders, excepting the petitioner, afterwards signed an agreement to extend their several debts, but he refused to sign it. When his note became due, it was not paid by the company, nor were funds furnished him by them, and he took it up within fourteen days after its maturity. He has sued the company at law, and in this petition sets up the non-payment of this note and the mortgage to Ames as acts of bankruptcy.

The treasurer testified that the company owed very few debts, excepting to its shareholders, and met all its ordinary obligations promptly, and was in good credit; that it could pay this debt, but considered that the petitioner was bound to wait.

E. Avery, for the petitioners.

D. W. Gooch, for the respondents.

LOWELL, J. This case has all the appearance of an attempt to coerce the payment of a disputed debt, by an attack on the commercial standing of a trading corporation. Nevertheless, if that corporation has suspended payment of its commercial paper, and there is no real dispute of its validity, or if it is bankrupt for any other reason, the powers of the court are rightly invoked. I am of opinion that there is no commercial paper of the company overdue. The debt to the petitioner is for money paid to take up his own note, which he had lent to the company; that debt does not depend upon the company's indorsement of the note, but upon the fact that money has been paid in their behalf. If there had been no indorsement, the right of action would be the same in fact and in form. When the petitioner took up his own note, it was paid, and he neither need to nor can declare upon it as still outstanding. He lent it to the company for the very

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purpose of having it discounted as his note, and not as theirs, and his obligation was always that of a promisor, and intended to be so, and their obligation to the holder was merely that of an indorser. Their obligation to this petitioner was truly represented by the receipt, which agreed to save him harmless ; and, as soon as he was damnified, he had a good cause of action for money paid, but not upon a promissory note ; and as the note was taken up within fourteen days after it was due, there never was any suspension for that period.

A more difficult question is, whether in March, 1871, when the mortgage to Ames was given, the company were insolvent, and intended the mortgage to be a preference. There is evidence that they needed money to carry on their business ; and, if we leave out of view the fact that the great body of their creditors were their own stockholders, and hold the debts of this class to be ordinary trade debts, there is certainly much ground to say that they were insolvent. The petitioner maintains that these are ordinary debts ; but it is quite apparent that the whole object and purpose of these loans was to enable the company to carry on its business, and that it would frustrate this purpose to require them to be repaid on demand, or even in four months, and, therefore, it may be presumed that most of the lenders had not the slightest intention of treating their loans in that way. I do not mean to say that they had not a legal right to demand payment, but they had no intention of pressing their demands at the risk of the insolvency of the company, which was precisely what they were seeking to avoid. When, therefore, all, excepting the petitioner, agreed to extend their loans for one year, the question of insolvency was perhaps adjourned for that time. This was the way it struck me at the hearing, as I then intimated. Here was a company in good credit, meeting all its trade debts, but having what the treasurer swears to have been, and the other members, excepting the petitioner, appear to have considered, a sort of permanent loan. I fear it might be straining a point to say that this company was insolvent, so that whatever payments it made or security it gave must be taken to be acts of bankruptcy, if attacked within four months. It is the result, undoubtedly, when traders are wholly

insolvent, and generally known to be so, that all dealings with them, excepting for present considerations, are liable to be avoided, if they are objected to within the prescribed time.

But another ground exists in this case for saying that the petitioner cannot rely on this act of bankruptcy. The corporation, at a meeting at which he was present, voted to give this security ; and he did not dissent, and, indeed, so far as appears, assented. It has been held that the vote cannot affect the private rights of stockholders, in their dealings with the corporation, if they were not present and did not assent, and had no notice of the vote until it was too late to affect action under it, though the meeting was a legal meeting : *American Bank v. Baker*, 4 Met. 164.

But here the petitioner was present, and did assent, or did not dissent, and had full notice of the vote. It may be said that it would be useless for him to dissent, when he found that a majority was in favor of giving the mortgage ; but I think, if he understood that the corporation was about to commit an act of bankruptcy, as he says it was, it was his duty to protest and see if the stockholders deliberately intended to put themselves in that position. He is proceeding against the corporation for an act which he helped them to commit, and this is a breach of faith towards his fellow-stockholders. There can be no clearer or more decisive act of bankruptcy than for a trader to assign all his property to trustees for the benefit of his creditors. Such an act is not even capable of explanation ; because, however honest it may be, it is a technical fraud on the statute. But it has been uniformly held that a creditor who assents at a meeting of creditors, is estopped to set up the deed as an act of bankruptcy. *Hicks v. Burfitt*, 4 Campb. 235, n. ; *Ex parte Kilner*, Buck, 104, and the decisions of Lord Eldon, cited in that case in the argument ; *Bamford v. Baron*, 2 T. R. 594, n. ; *Ex parte Cawkwell*, 19 Ves. 233 ; *Back v. Gooch*, Holt, 18 ; *Oliver v. King*, 8 DeG., McN. & G. 110. Two of these decisions go to the mere silence of a creditor. Indeed, in one of them the creditor advised against the course of action adopted. Applying them to this case, it would seem that the petitioner's failure to protest, at a time and place where he, as a creditor, had a right to be heard, would bind him, and this whichever way he voted on the question. My doubt

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was, whether at a meeting of stockholders, not called as a meeting of creditors, it might be presumed that any thing but the affairs of the corporation were to be regarded, and whether a creditor, who happened to be a stockholder, ought to be expected to interfere. But, upon reflection, I find it impossible to divide the rights and interests of the parties in this way ; for every meeting of stockholders was, in fact, a meeting of the chief creditors, and, besides, it rather strengthens the argument for an estoppel, that the creditor was not only suffering the debtor to commit an act of bankruptcy, but himself held such relations to the debtor that he was bound to notify him of the consequences of his proceedings.

The evidence tends to show not merely a constructive breach of good faith, but an actual one. The petitioner left Boston before the mortgage was delivered, and left written instructions that the defendants should be made bankrupts, and the mortgage be broken up if his note was not provided for at maturity. And, on the other hand, there is no evidence that any other party interested had any thought of bankruptcy, or understood that an act of bankruptcy was about to be committed. The consent of creditors that was asked for and obtained was not to the mortgage, but to the extension ; that is, Ames would extend his proportion if the others would extend theirs. As to the mortgage, no one is estopped if this petitioner is not ; because all that any of them formally and in writing agreed to was the extension. I think, upon the whole, it was the duty of the petitioner to warn the corporation that they were committing an act of bankruptcy of which he or some other creditor might take advantage ; and, as he has not done so, he is estopped to set up the mortgage as such an act.

Petition dismissed.

FIFTY THOUSAND FEET OF TIMBER.

SEPTEMBER, 1871.

A salvage service is performed when a raft of timber is saved from peril on navigable waters.

A claim for such salvage service may be maintained in a court of admiralty, if there is no local custom making the service gratuitous.

LOWELL, J. These two rafts of timber were found floating in the harbor of Boston during the ebb tide in the evening, at a considerable distance from the place where they had been moored, and services were rendered by the libellants which would enable them to secure reasonable compensation, at least *pro opere & labore*, if the court has jurisdiction of the suit as one of salvage, and if salvage services can be performed to a raft of timber. Decisions can be cited against the view that this is a case for salvage; but I am of opinion, nevertheless, that it is of that character. A salvage service is performed when goods are saved from peril at sea, or on other navigable waters, or cast upon the shores thereof. And this case is within the definition.

There are two judgments that a raft of timber is an exception to the general rule: *Nicholson v. Chapman*, 2 H. Bl. 254; *Four Cribs of Lumber*, Taney, 533. The first of these cases was decided when the admiralty courts were prohibited from entertaining such actions if the place of performance was in the body of a county; and the court held that there would be great hardship and inconvenience to the trade in permitting such claims to be set up when the services were done so near home; and, as no compensation is allowed by the common law in cases of this kind, it refused to make any distinction in favor of a river. This decision appears to be sound, upon common-law principles. When Taney, C. J., decided the second case above cited, our courts of admiralty had made the discovery that water is water, even within the limits of a county; and he gave no force to the point of locality as a jurisdictional fact, but he thought that *Nicholson v. Chapman* was well decided upon general grounds of convenience, especially as he found a custom to prevail in the

Fifty Thousand Feet of Timber.

timber trade of the Susquehanna, by which there was to be no salvage in such cases. He said that the salvors must seek their remedy for a reasonable compensation in the courts of common law; forgetting that these courts never allow any compensation, unless there is evidence of a promise.

Another decision sometimes cited is *Raft of Timber*, 2 W. Rob. 251, which turned merely upon a question of jurisdiction; the courts of admiralty having been prohibited from entertaining such a claim arising, as this arose, within the limits of a county, and parliament having granted them jurisdiction, even within those sacred precincts, in respect to salvage services rendered to any ship or sea-going vessel, Dr. Lushington very properly decided that a raft was not a ship or sea-going vessel. Another statute soon remedied the defect pointed out by this case; and gave the admiralty jurisdiction to decide upon all claims and demands in the nature of salvage for services performed, whether in the case of ships, goods, or other articles found at sea or cast on shore, and whether the services had been performed on the high seas, or within the body of a county: 9 & 10 Vict. ch. 99, § 40. It is perfectly clear from this statute, and from the concessions of counsel and court in the case in 2 W. Rob., that salvage services may be performed to a raft of timber as well as to any other property, and that the only difficulty was one of locality. And so it was held by Judge Betts, in a well considered judgment: *A Raft of Spars*, 1 Abbott, Adm. R. 485.

A suit for salvage is neither contract nor tort. It resembles the latter in being a proceeding for unliquidated damages, and in depending on locality. No personal action will lie without either an express promise or an acceptance of the goods subject to the maritime lien, and in the latter case it is only maintainable to the extent of the lien, and only in the admiralty. If the services are rendered, it is of no consequence whether the goods are a ship or part of a ship, or were ever on board a ship. A great many of the cases are of mere derelict goods picked up at sea; and no one ever heard that it would be a defence to a proceeding for salvage, that the goods had been washed out to sea from the shore by a gale or a flood, or had been dropped from a balloon. I have had a case of the former kind; though, to be sure, the

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subject-matter was an unmanned vessel. If it had been a barrel of oil, the principle would have been the same.

No custom has been proved in this case for timber merchants to assume their own risks. Nothing whatever has been advanced in evidence to distinguish this from any other case of salvage. The arguments which prevailed in the two cases first cited find no support from the facts of this case. Most of them will apply to any salvage services performed near the shore; and to all of them the sufficient answer is, that the admiralty court has full power to regulate the compensation, or to deny it altogether, as circumstances may require. To my mind it is entirely clear that the only adverse case in this country depends, and can only be supported, upon the custom proved to exist in that case; and that the English cases, which failed solely from a defect of jurisdiction, have been remedied by the healing power of parliament, which has restored the old jurisdiction of the admiralty.

Salvage decreed.

RE KRUEGER & AL.

SEPTEMBER, 1871.

One who permits his name to be used in a firm from which he has retired is liable to a person who has bought a note of the new firm, without notice or knowledge of the change.

In such a case constructive notice is not sufficient.

One who permits himself to be held out as a partner may be made bankrupt as a member of the firm at the suit of creditors.

PETITION against Krueger, Loud, & Bailey, alleged to be partners in trade under the firm of Krueger, Loud, & Co., and to have stopped payment of their commercial paper. Krueger defended on the ground that he had left the firm before the note held by the petitioners was given. The firm had carried on the lumber business at Boston for about three years, and in September, 1870, there was a verbal agreement for a dissolution. Krueger retired, and sold out his interest to the remaining partners on a credit of four months, with a condition that the sale should be void if the notes were not paid at maturity, which they were not.

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He took no further part in the business, which, however, was conducted in the old name of Krueger, Loud, & Co., with his consent, and the name remained over their place of business. In December, 1870, notice was published, three times each, in two newspapers of Boston, that Krueger had retired, and that Loud & Bailey would continue the business at the same place and under the old name. The petitioners were bankers, who had often discounted the firm notes and other paper signed or indorsed by them; but never by direct negotiation with the firm, or any member thereof, but through a broker or other third person. This note was given, in the name of Krueger, Loud, & Co., in February, 1871, to Badger & Batchelder, in exchange for their note, as had often been done by both the old and new firm. The petitioners had no actual notice of the dissolution, though they always took in at their office one of the newspapers in which the notice was printed. There was conflicting evidence upon the question, whether Badger & Batchelder had such notice. They sold the note to the petitioners for value, before its maturity.

H. D. Hyde, for the petitioners.

C. P. Judd, for the defendant Krueger.

LOWELL, J. Three points are clear upon the evidence before me: 1. The firm of Krueger, Loud, & Co. was dissolved by the retirement of Krueger in September, and this was published in the newspapers in December. 2. The petitioners had no actual notice, and supposed when they took the note that it bound Mr. Krueger. 3. The old firm style, which included the name of Krueger, was retained by his former partners, with his consent. The other matter of fact, whether Badger & Batchelder, the payees of the note, had actual notice of the change, was not so fully cleared up as would be desirable, and might have been practicable, if all possible witnesses had been examined. Assuming that the petitioners had never dealt so directly with Krueger, Loud, & Co. as to be entitled to actual notice of the dissolution of the partnership, still, if they took this note, relying in part on the credit of Krueger, and he authorized his late partners to use his name in their business, he is responsible as a partner in respect to this note. One of the reported cases decides that the mere

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authority to use the former partner's name imports an obligation for all debts, even those held by a person who knew of the arrangement: *Brown v. Leonard*, 2 Chitty, R. 120. Another case decides that the retired partner, if his name is retained in the firm, is liable for injuries caused by the negligence of a driver of a dray belonging to the new firm: *Stables v. Eley*, 1 C. & P. 614. These decisions go much beyond any thing demanded by this case; but they seem to have received the approval of the text-writers. Thus Chancellor Kent says (3 Com. 5th ed. 68): "When a single partner retires from the firm, the same notice is requisite to protect from continued liability; and even if due notice be given, yet, if the retiring partner willingly suffers his name to continue in the firm, or in the title of the firm over the door of the shop or store, he will still be holden." And in 1 Lindley, Partnership, 45, it is said to be wholly immaterial whether the person holding himself out as a partner does or does not share profits or losses, and even that it is known that he does not share them; because the permission to use his name imports a willingness to be liable for the debts, and to look to the real partners for indemnity. And at page 330 of the same volume, we find: "If a partner retires, and gives notice of his retirement, and he nevertheless allows his name to be used as if he were still a partner, he will continue to incur liability, on the principle of holding out explained in the earlier part of this treatise."

That one who is not really a partner may be bound as such to third persons, who have been led by his acts or declarations to believe him to occupy that relation, is familiar law, and has been often recognized in Massachusetts. Story, Partnership, §§ 64, 65; *Fitch v. Harrington*, 13 Gray, 468; *Adams Bank v. Rice*, 2 Allen, 483, *per Bigelow*, C. J. In *Goddard v. Pratt*, 16 Pick. 412, it was held that the members of a copartnership which had been dissolved, but permitted the firm name to be used by an incorporated company, were liable upon contracts made by the corporation in the name of the firm with persons who had no knowledge of the dissolution. That case does not find what notice is necessary in order to exonerate the partners; and it may be argued, with some force, that a publication in the newspapers

Re Smith.

is enough to bind all persons who had not dealt directly with the firm before the notice was published. This is the general rule; but we have seen that the English books, and Chancellor Kent in his Commentaries, make an exception of a case like the present, and hold that the retiring partner remains liable, notwithstanding notice, if his name is still used with his consent. It may possibly be doubted whether an estoppel ought to apply where the creditor has actual notice of the true state of the case; but leaving out actual notice, which is negatived by the evidence here, I believe the true rule to be, that one who suffers his name to be used in a firm must answer to all who rely on that name, whether old customers or not. Here is a note signed Krueger, Loud, & Co., with the defendant's authority. As between the parties, it means only Loud & Bailey; but when third persons take it in good faith, believing that it binds the three persons who are apparently bound by it, they must be bound.

It was held in Massachusetts that one not really a partner could not be made bankrupt as such upon the petition of one of the actual partners: *Hanson v. Paige*, 3 Gray, 239. But I have no doubt that creditors may proceed in bankruptcy, as elsewhere, against all the persons who are held out as partners. See *Re Disideri & Co.*, L. R. 11 Eq. 242; *Re Rowland*, L. R. 1 Ch. 421.

In accordance with this opinion, the defendant Krueger will be defaulted.

Re SMITH & AL.

SEPTEMBER, 1871.

One who contracts with a railroad company to grade and build its road is not, by virtue of such contract and his acts under it, a merchant or trader within sect. 89 of the bankrupt act; and the suspension of his commercial paper is, therefore, not an act of bankruptcy.

A CREDITOR'S petition represented that the defendants were joint traders, who had fraudulently suspended payment of their commercial paper. It was proved that they were contractors to build the Ware River Railroad, and were to grade the road, put down the ties and rails, and build the stations; receiving money,

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bonds, and shares of the company, in certain proportions, as the work proceeded. Whether they bought any materials on credit did not appear. They needed money to carry on the work; and raised it in part by acceptances of the petitioner's drafts, which he signed for a consideration, and some of which he had been obliged to take up.

G. F. Verry, for the petitioner.

J. W. Allen, for the respondents.

LOWELL, J. The defendants are joint contractors for building a railroad in the western part of this State; and the main point of discussion has been, whether, as such contractors, they are traders within the thirty-ninth section of the bankrupt act, so that the dishonor of their commercial paper, continued for fourteen days, is an act of bankruptcy. The most usual meaning of "trader" is one who buys and sells goods. In a writ or deed or indictment it would not be regular to describe one as a trader whose business it was to build or undertake works upon the land of other people. Bouvier, in his Law Dictionary, defines "trader" as one who makes it his business to buy merchandise, or goods and chattels, and to sell the same for the purpose of making a profit. In the later statutes of bankruptcy in England, a long alphabetical list of the persons who shall be deemed traders is made a part of the act; and it may be found necessary for congress to enlarge the description of those the dishonor of whose promises shall be an act of bankruptcy, since this has been found a simple and safe test of insolvency; and they have already, by the amendment of 13th July, 1870, added manufacturers, brokers, and miners. In respect to most manufacturers, the act is, perhaps, only declaratory; for they have been held to be traders, since they buy goods and sell them again, though after changing the form and value of the articles: *Re Eeles*, 5 Law Reporter, 273; *Wakeman v. Hoyt*, id. 309. The amendment seems to show that congress had a doubt whether even manufacturers could in all cases come within the description of merchants and traders; and certainly miners would not. The cases under the earlier English statutes were many, and not altogether harmonious. Whether stocks were chattels, and whether certain acts amounted to buying and certain others to selling, was disputed; but it was

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agreed, that to be a trader one must both buy and sell chattels or merchandise. A clergyman who was largely engaged in draining his lands was not a trader ; because, though he bought goods for use in his operations, he did not sell again : *Hankey v. Jones*, Cowp. 745. And see Com. Dig. Bankrupt (B) ; Henley (Eden) on Bankruptcy, ch. 1 ; *Ex parte Gibbs*, 2 Rose, 38 ; *Patten v. Browne*, 7 Taunt. 409. It was decided under the act of 1841 that a livery-stable keeper was not a trader : *Hale v. Cooley*, 3 N. Y. Leg. Obs. 282. And it was so of innholders, gun-founders, and victuallers to the navy, in England : Com. Dig., *ubi supra*.

I am aware that neither the English statutes under which these decisions were made, nor our own laws of 1801 and 1841, had the word "trader." They used a paraphrase, substantially this : any person using the trade of merchandise in gross or by retail. But, in all the arguments and decisions, the word "trader" was taken to express the exact equivalent of the statute phrase ; and such seems to be its ordinary and proper meaning. "Trade" has a secondary sense, by which almost any occupation is called a man's trade ; as in the proverb, "two of a trade can never agree:" but this latitude has not been extended to "trader." If, then, it be true, as was ably argued, that all who have occasion to borrow money on their notes or acceptances are within the mischief of the statute, I must, nevertheless, be governed by its language, when it is clear. I have heretofore ruled to the jury, that a dealer in real estate, and a builder, were not traders and tradesmen under sects. 29 and 39 of the statute ; and I consider those rulings, though sound, much more doubtful than one which denies the name to persons who have one contract or several for grading and building a railroad, to be paid for by the company who own the land and franchise.

Petition dismissed.

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Re GALLISON & AL.

OCTOBER, 1871.

A creditor who obtains judgment for his debt after an adjudication of bankruptcy has issued against his debtor, and takes out execution, cannot prove his debt in bankruptcy; and the judgment will not be affected by the certificate of discharge. Such a creditor, therefore, cannot oppose the bankrupt's discharge.

The decisions on this point considered.

Where a creditor prosecutes his suit merely for the purpose of ascertaining the amount due, he should cause that fact to appear of record, and the judgment should be modified to correspond with the fact.

Where such a creditor proved his debt, and afterwards obtained an unconditional judgment, and took out execution, and appeared to oppose the discharge, no one having moved to expunge his proof, — *Held*, he would be heard against the discharge on filing a stipulation to cancel his judgment if the discharge should be granted.

OBJECTIONS to bankrupts' discharge. The debtors' petition was filed Dec. 31, 1867; and their application for discharge, Jan. 21, 1871; and was opposed by S. Klous & Co., creditors, who had proved their debt, and had afterwards obtained judgment and taken out execution in a suit which was pending at the time of the bankruptcy. There were assets.

E. Avery, for the creditors.

J. M. Baker, for the bankrupts.

LOWELL, J. The creditors have not taken the ground that the application for discharge should have been made within a year after the adjudication. The decision of Nelson, J., *In re Greenfield*, 2 N. B. R. 311, that the limit applies only to cases in which there are no assets, has been followed by me for the sake of uniformity of practice, until the circuit court here should pass upon the question, and has been accepted elsewhere, though as an original question its soundness is more than doubtful.

The debtors maintain that S. Klous & Co. are not interested in the question of their discharge; because they have obtained a judgment since the proceedings were begun, which will not be affected by the result. It has been one of the vexed questions of the law, whether a discharge in bankruptcy or insolvency will operate on a judgment obtained after the date to which the dis-

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charge relates, but before it is actually issued; that is, pending the bankrupt proceedings. In Maine and Massachusetts it has been held that the judgment merges the original debt, and cannot be proved in the bankruptcy, and will not be affected by the certificate: *Holbrook v. Foss*, 27 Maine, 441; *Fisher v. Foss*, 30 id. 459; *Pike v. McDonald*, 32 id. 418; *Sampson v. Clark*, 2 Cush. 173; *Woodbury v. Perkins*, 5 id. 86; *Faxon v. Baxter*, 11 id. 35. See *Wolcott v. Hodge*, 15 Gray, 547.

On the other hand, in New York and Vermont the decision has been, that the judgment may be looked into; and, if it is found that the debt was one that would be discharged, the judgment will be barred: *Harrington v. McNaughton*, 20 Vt. 298; *Downer v. Rowell*, 26 id. 397; *Dresser v. Brooks*, 3 Barb. 429; *Fox v. Woodruff*, 9 id. 498; *Church v. Rowling*, 3 N. Y. 216. A similar difference of opinion has already appeared in connection with the act of 1867. *In re Williams*, 2 N. B. R. 229; *Bradford v. Rice*, 102 Mass. 472; *In re Brown*, 3 N. B. R. 584; *In re Crawford*, id. 171 (4°).

The argument for the side which the defendant assumes in this case appears to me much the stronger. It is not only the technical doctrine of merger which is involved, but the defendant has had his day in court and one opportunity to plead this defence; and I take it to be a rule of the highest importance, that a defence which might have been made to the original cause of action can never be made to the judgment. Now, the bankrupt act provides most carefully for a stay of suit until the defendant's discharge is passed upon; giving, by fair implication, a power to the district court even to enjoin actions in the State courts, contrary to the general practice. All this is for the very purpose of enabling the bankrupt to plead his discharge. If he does not choose to avail himself of this right, what possible ground is there for saying that the judgment shall not bind him? Are we to inquire in each case why his plea was not set up, or why it was overruled? It may be that the State court was of opinion that the discharge, if granted, would be no bar. We cannot impeach their decision collaterally. It may be that the bankrupt intended not to set up the discharge against this creditor. We cannot authorize him to reconsider this determination. It may be that he was surprised.

If there were any failure of justice in the particular case, the remedy must of course be found with the tribunals of the same jurisdiction. Until they have reversed or set aside the judgment, it operates as a new contract; and cannot be barred by a discharge which distinctly relates, as does this, to a date two years earlier.

Coming to the decisions, we find that the two leading cases in New York both contain dissenting opinions of great ability, by Allen, J., in 3 Barb. 492, and Bronson, J., in 3 N. Y. 216, besides decisions and *dicta* of inferior courts of that State, against the doctrine finally established there. I consider these dissenting opinions well worthy of examination, and refer to them as able statements of what I consider the true doctrine; and they cannot but weaken the force of these authorities. But the conflict is really explained by the difference of practice in the several States. In Massachusetts, the bankrupt could always obtain a continuance to enable him to plead his discharge; while in New York he could not. This difference is pointed out in *Haggerty v. Amory*, 7 Allen, 458; and is confirmed by the remarks of the learned judge who delivered the opinion of the court in 3 N. Y. 224, where, in commenting on a remark of the chancellor at 11 Paige, 535, that the defendant ought to have pleaded his discharge at law, he says: "And this may be conceded where the defendant has an opportunity for that purpose, which was not the case of the defendants in this suit." In consideration of this concession, it may well be doubted whether the decision would have been the same under a law which gives the most ample "opportunity for that purpose," as ours does.

In truth, this is the source of the whole difficulty. It is seen to be unjust that a creditor should push his debt to judgment against a bankrupt who is using due diligence to obtain his discharge, and who has surrendered all his property. The early English practice gave the creditor an election to prove in bankruptcy or prosecute his action; and, if he obtained judgment and execution, he could dispute the validity of the proceedings in bankruptcy, by seizing the property in the hands of the assignees, — a practice which led to a vast amount of litigation and uncertainty. He might, instead of seizing property, take the debtor in

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execution. But it was enacted, as early as 1730, that, if a creditor did obtain such a judgment and take the debtor in execution, or detain him in prison, after he had received his certificate, he should be discharged on motion. Stat. 5 Geo. II., ch. 30, § 13. And this was continued in force until 1869. The English practice has had an undue weight in some of the decisions in this country. See the arguments in *Dresser v. Brooks*, 3 Barb. 429. The law was so in England; but it was the statute itself which provided for the case, and not any general rule in bankruptcy. It is easy to see, by studying the English cases, that this practice was established by statute to meet the very difficulty which our statute meets by granting a stay of actions until the question of discharge is determined. The statute of 1869 will work an entire change of the practice in England, and bring it to the true position. It gives the court of bankruptcy full power to stay actions; and no summary motion will hereafter be made, nor any judgment be obtained in that country, excepting such as will not be discharged by the certificate.

By our law, sect. 21 (Rev. Stats. § 5106), an action may, by leave of the court in bankruptcy, proceed to judgment for the purpose of ascertaining the amount due; and that judgment may then be proved, but execution shall be stayed. This exception strengthens the argument for the general rule; because it implies that an ordinary judgment, procured after the proceedings in bankruptcy are begun, cannot be proved in the bankruptcy. It is clearly the intent of the proviso, that it should appear of record that the suit is prosecuted only for the particular purpose of establishing the amount of the debt, and that the court in which the suit is pending should modify its judgment as may be necessary to meet this state of facts, and should take care that no execution shall issue; and, if the discharge should afterwards be granted, that court ought undoubtedly to vacate or discharge the judgment in some proper way, and I hold it to be the duty of the creditor to see that the record is rightly made up. This provision is useless if an ordinary judgment, not obtained by virtue of this proviso, can be proved in the bankruptcy. The objecting creditor here did not apply for leave to prosecute; did not record the fact that he intended to prove his judgment; did not stay his execution,

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but took it out, and now holds and intends to enforce it. It was argued in his behalf that the superior court may yet set it aside. But he cannot be heard to set up this possibility, when he himself is still relying on the judgment, which was obtained by his own act, and the validity of which he intends to maintain if he can.

For the reasons given and upon a careful examination of the decisions, I am of opinion that a judgment obtained after the adjudication in bankruptcy, creates a new debt which cannot be proved in bankruptcy; and that the judgment creditor cannot oppose the discharge, because he has no provable debt, and because the discharge will be no bar to the judgment.

These creditors proved their debt before they obtained the judgment, and have a standing in court which no one has undertaken to destroy by a motion to expunge. I hold it, therefore, within my power to say that they may keep their proof if they will file a stipulation to release their judgment, in case the final decision in bankruptcy should grant the bankrupt his discharge. This will meet the exact justice as well as the law of this case. If they shall do this within a week, I will hear the case further. If not, the objections will be dismissed.

Order accordingly.

CHARLES CHESTER & AL. v. ENOCH BENNER.

NOVEMBER, 1871.

Where seamen were imprisoned in a foreign jail by order of the American consul at that port, and there was no evidence of bad faith on the part of the master, — *Held*, this court, in a case not large enough to be appealed, is bound to follow the decision in *Jordan v. Williams*, 1 Curtis, C. C. 66, though doubting its correctness; and that the doctrine of that case, fairly carried out, requires the men to pay the necessary charges of the imprisonment, and the expense of hiring substitutes.

But the consul's own charges, as judge, are to be paid by the ship. Reasons for this rule.

A clause in the shipping articles by which the crew agree to pay charges of imprisonment does not bind them to pay the fees of the consul acting as judge.

THIS libel was for wages of six seamen, earned on a voyage of two months and twenty days, from Boston to Paramaribo, in Suri-

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nam, and back to Boston, in the bark Tidal Wave. The only dispute was, whether seventeen dollars and sixty-seven cents which had been retained from the pay of each man was rightly deducted. The answer alleged that, at Paramaribo, the libellants "became intoxicated and drunk, incapable of doing duty, and disobedient, insubordinate, and mutinous," &c.; that the master called in the consul, who ordered and caused the libellants to be detained in custody upon due legal proceedings, and that they were so detained for four days; that the master hired other persons to do the libellants' duty, at a cost in all of eighteen dollars in gold; three dollars for each man; and that the costs and expenses of the arrest, custody, board, and release of the libellants were ten dollars and sixty cents in gold for each of them; all which was paid.

The certificates of the consul were received as evidence, by consent, and the only witness examined to the occurrences abroad was the master, who swore that the men, or some of them, were intoxicated one morning while in port, and all refused duty under pretence that the food was bad; that the consul came on board and examined the food, and pronounced it good, and gave the men five minutes to return to duty, which they refused to do; and they were sent to jail until the ship was ready to sail, when they were returned on board, and performed the rest of the voyage; that before and after this time their conduct was irreproachable.

C. G. Thomas, for the libellants.

J. B. Richardson, for the respondent.

LOWELL, J. This case, though small in the amount of money involved, is important to masters and crews generally. The imprisonment of our seamen in foreign jails has always been looked upon by courts of admiralty with disfavor, from the suffering and hardship which often accompany it; and there are many decisions which require the master to make use of this mode of restraint or punishment only in cases of necessity, where the great powers which the law gives him on board his own ship are inadequate to the emergency. It was also uniformly held that the consul had only an advisory power, and the master was responsible if the imprisonment was unjustifiable. Thus Hop-

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kinson, J., in *The Coriolanus*, Crabbe, 241 : " I have repeatedly expressed my disapprobation of putting our seamen into foreign jails and dungeons, at the mercy of the local police-officers, for offences by no means requiring such severity. For ordinary misconduct or insubordination, the power of the master on board his vessel is amply sufficient for all the purposes of discipline and subordination, and it is only in cases of extraordinary violence, where the safety of the vessel or of those on board requires that the offender should not be suffered to remain there, that he should be taken and imprisoned on shore. . . . And here I would again correct an error into which captains are continually falling. They seem to believe that, if they can get the consent or co-operation of the consul to their proceedings, it will be a full justification for them when they come home. . . . In all my experience I have never known a consul refuse the application of a captain to imprison a seaman," &c. In that case, on appeal, Mr. Justice Baldwin not only affirmed the decision, but said that if the case had come before him in the first instance he should have given damages for the imprisonment, as well as full wages. See note at end of the report. The decisions, which, up to the year 1840, are entirely uniform, are collected in 2 Parson's Shipping and Admiralty, 91, n. 5. In 1840, congress passed an important act regulating the shipment and discharge of seamen, and the duties of consuls, of which the eleventh section requires those officers " to reclaim deserters and discountenance insubordination by every means within their power ; and where the local authorities can be usefully employed for that purpose, to lend their aid and use their exertions to that end in the most effectual manner." 5 Stats. 395. This statute has been construed in the circuit court for this circuit to give consuls jurisdiction over the imprisonment of our seamen in foreign jails, and, in such case, to relieve the master from responsibility in the matter, if he has acted in good faith : *Jordan v. Williams*, 1 Curtis, C. C. 69. That case virtually decides, that, in suits between the crew and the master or owners, such an imprisonment by order of a consul must be presumed to have been necessary ; and, it seems to follow and is intimated by the court, that the necessary charges resulting from that course must fall upon the seamen, as between them and the

owners, though they have a right of redress against the consul. In a case like this, in which no single sum in dispute is large enough to admit of an appeal, I must follow that decision of the circuit court, though I venture to think its reasoning unsound. Still, it remains my duty to inquire carefully into the nature and propriety of the charges, and whether they all fall strictly within the rule.

The sum deducted from each man's pay was seventeen dollars and sixty-seven cents in currency, equal to three weeks' pay of each able seaman, and more than six weeks' pay of the boy. At the rate at which the settlement was made, this sum is the equivalent of fifteen dollars and a half in gold; and, as I read the evidence, eighty cents of this, and no more, is the cost of subsistence for each man on shore, three dollars the cost of a substitute, and the rest is made up of fees of one kind and another, and largely those of the consul, who was the judge in the case. The evidence does not account for quite all the charges; but it is admitted that seven dollars in gold was charged against each man by the consul, and I think it may be not unfairly inferred that some of the items not accounted for were for his various certificates. At any rate, he charged in gold against each man two dollars for ordering the arrest, two dollars for ordering the imprisonment, two dollars for ordering the release, and one dollar for certifying. To the other reasons which admiralty courts have given for discountenancing this method of dealing with seamen, this case requires me to add the great and disproportionate expense which it entails. I am of opinion that it will be neither just nor prudent to oblige the crew to pay for a decision against them. If the ship pays the judge, the master will be interested to see to the charges; while, if the crew pay him, both the master and the consul will be interested in favor of a decision to imprison, because both will then recover costs. It is impossible that the crew should scrutinize the consular accounts, or even know of them until they are paid; and their right of action against the consul is, of course, of no value. In this instance, I doubt if any of these expenses would have been incurred if the ship had been known to be responsible for them. While, therefore, I agree that in theory the owners should lose nothing, so long as the

construction of the law remains as it is, yet practical justice requires, as a guarantee of good faith and a check on hasty action, and as the only possible means of keeping the fees within due bounds, that the consul's fees should be paid by the ship. There will be a trifling compensation in the subsistence which the ship will escape during the absence of the men.

The shipping articles contain this clause: "And whereas it frequently happens that the owner or captain incurs expenses while in a foreign port, relative to the imprisonment of one or more of his officers or crew, or in the attendance of nurses, or in the payment of the board on shore, for the benefit of such person or persons: now it is understood and agreed by the parties hereunto, that all such expenditures as may be incurred by reason of the foregoing premises shall be charged to and deducted out of the wages of any officer, or such one of the crew, by whose means or for whose benefit the same shall have been paid." Assuming, for the purposes of this case, that the stipulation is valid, it means only that the lawful and reasonable expenses of a necessary imprisonment shall be paid by the crew; and, if the action of the consul is to be conclusive of the necessity for imprisonment, his own fees do not appear to me to be a part of those reasonable expenses, for the reasons I have already given. The men, too, have all signed receipts in full; but it is testified by the respondent's witness that some of them protested against the amount of deductions: and courts of admiralty, when the facts are clear, and show that a smaller sum has been paid instead of a greater one due, never regard a receipt in full; though it is often of much significance in contradicting a case made up by an afterthought, or in cases of doubt or compromise.

Upon the whole, I think I ought to allow the respondents to deduct all excepting the consul's fees. I shall always examine the other charges with care, and require them to be well substantiated; but there seems nothing to impeach them here. It is admitted that the consul's charge against each man was seven dollars, and there is one dollar and ninety cents against each not accounted for. The burden of proof on the owners to establish their deductions may, perhaps, be fairly met by the receipts of the men; so that I ought not to charge this unexplained balance

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against the owners, unless it was probably a part of the official charges. There is some reason to believe that the consul did make further charges for his various certificates; and this may be inferred to be the origin of a part of the balance. I shall divide this between the parties. The crew, then, are to recover seven dollars and ninety cents each in gold, which is nine dollars in currency.

Decree accordingly.

F. B. COFFIN v. W. F. WELD & AL.

DECEMBER, 1871.

Seamen who are persistently ill-treated by their officers have the right to demand a discharge from their contract; and, if they leave the vessel, they are not deserters. The statute of 1840, clause 17, 5 Stats. 896, requiring consuls, when deserters are apprehended and brought before them, to inquire into the facts, and, if satisfied that the desertion was caused by unusual or cruel treatment, to discharge the deserter, who shall have three months' extra pay, is to be construed to give consuls the like power and duty when applied to by seamen who have not deserted.

Taking into consideration the other acts *in pari materia*, and especially the statute of 1856, § 26, 11 Stats. 62, one-third of the three months' pay mentioned in clause 17 of the act of 1840 is to go to the United States.

Where it appeared that the crew justly complained of cruel conduct on the part of the mate, and the consul at a foreign port effected a compromise, by which the master was to discharge the mate and the crew were to navigate the ship to the next port; and the crew went on board the ship again, but afterwards refused duty, upon a suspicion, which appeared not wholly unfounded, that the mate had not been discharged, and the consul then discharged them for disobedience, — *Held*, they might recover two months' wages; because they were entitled to their discharge, and the consul had never adjudged that they were not.

WAGES. — In February, 1870, the libellant was shipped at Boston on the ship *Fearless*, belonging to the respondents, for a voyage to Batavia and other ports in the East Indies, and back to the United States. He was discharged at Batavia in May, and was sent thence to Singapore, where he took service on board another ship, at a less rate of wages, and arrived home in November, 1870. The *Fearless* reached this port in January, 1871. The libellant alleged that he was discharged by the consul at Batavia on account of ill-usage received from the master and mate. The answer insisted that eight of the men complained

to the consul of the mate's harsh and cruel conduct, and made no charges against the master; and that it was agreed, upon the suggestion of the consul, that the mate should be discharged, and the men should return to duty; that the mate was discharged, and left the ship; but the men, on being required to get the ship under weigh, refused to do any duty, and were discharged by the consul for disobedience. The evidence tended to show that the original ship's company consisted of a master, two mates, a cook, a steward, a carpenter, and sixteen men before the mast; that the ship arrived at Batavia in May, and eight of the men insisted on seeing the consul, and complained to him of ill-usage, and that the others afterwards made a similar complaint. The consul testified, that, according to the best of his recollection, the mate only was accused of cruelty, and not the master; and he further said, that it was agreed that the first mate, who was the cause of the difficulty, should be discharged, that the captain should give an agreement in writing that the crew should be well treated during the further prosecution of the voyage to Singapore, and the men should return to duty; that these terms were fully carried out by himself and the master, but the eight men still refused duty, and were discharged by him for disobedience. Whether the complaint was solely against the mate, or included the master, and whether the libellant agreed to the compromise, were disputed points upon the evidence. It was proved that the men returned to the vessel either voluntarily or through fear of coercion, and that the vessel was ready for sea, and the order was given to weigh anchor; that the mate was then on board, and in his working-dress, and witnesses on both sides said that they inferred he had not been discharged. It was at this time the eight men refused duty. The mate afterwards left the ship, but when, or under what circumstances, did not appear. The second mate had already been discharged, with his own consent, and a man had been promoted to his place. The remaining seven men made the trip to Singapore, and were all discharged by the consul there; and for cause of discharge the consul entered on the articles against the name of each man some act of cruelty or some threats on the part of the mate. The mate was reshipped at the same port, with a new crew.

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H. M. Knowlton, for the libellant.

H. C. Hutchins & H. H. Currier, for the respondents.

LOWELL, J. The libellant and seven others of the crew of the *Fearless* were discharged at Batavia, with the consul's consent. Neither the libel nor the answer states the facts correctly. The man was not discharged for ill-usage, as he alleges; nor is it exactly true that the master agreed to discharge the mate, and did discharge him, and that the men agreed to return to duty, as the answer puts it. The agreement appears to have been that the men would serve as far as Singapore, and be discharged there, for causes already existing; but the mate was not to go on that trip. The master broke his part of the compromise, or at least appeared to break it, by permitting the mate to be on board the ship in his working-dress, though he afterwards sent him on shore. The consul tried, in vain, to induce the men to return to duty, and to induce the master to take them to Singapore in irons; and at last discharged them for disobedience. Two questions arise from these facts: 1. Is the action of the consul conclusive of the right of the master to dismiss the men without pay? 2. If not, is the libellant, on the facts, entitled to any thing? Fraud excepted, the consul's action is binding on all parties in those cases in which the law gives him a discretion. By the very terms of the act of 1803 the production of his certificate that a seaman was discharged with his consent is a compliance with the master's bond to return the seaman, or produce the consul's certificate of his discharge: *The Mary*, Gilpin, 31. His order is held in this circuit to be a bar to an action against the master for causing the men to be imprisoned in a foreign port by the authorities thereof: *Jordan v. Williams*, 1 Curtis, C. C. 69.¹ When seamen are sent home by the consul to be tried for a crime, their right to wages has been held to end with the arrest: *Tingle v. Tucker*, Abb. Adm. 519; and his certificate of the assent of the seaman to his own discharge is conclusive: *Lamb v. Briard*, id. 367. But the certificate of the consul must show clearly his jurisdiction and the grounds of his action: *The Atlantic*, id. 451. And, as a general rule, the right to wages after a discharge, which is not

¹ *Chester v. Benner*, *supra*, p. 76.

made at the request of the mariner, may be supported or contested on its merits, notwithstanding the action of the consul; because the statutes give him no express authority to remit wages, excepting in the cases mentioned in the ninth and subsequent clauses of the act of 1840, the fifth, sixth, and seventh clauses of that act having been repealed by sect. 33 of the statute of 1856, 11 Stats. 65. In other cases, settlements of wages and other terms of discharge made by or with the sanction of consuls may be inquired into, and varied. See *Hutchinson v. Coombs*, Ware, 65; *Jay v. Almy*, 1 Woodb. & M. 262; *Brunent v. Taber*, 1 Sprague, 243; *The Atlantic*, Abb. Adm. 451; *Foye v. Dabney*, 1 Sprague, 212; *Jenks v. Cox*, 1 Holmes, 92. The consul has jurisdiction, as will presently appear, to inquire into cruel treatment of the crew by the master and officers; and if the consul in this case had decided that there had been no cruelty, his finding might be conclusive: but he made no such decision at any time. Cruelty was admitted to have been used towards all the men; and all that the consul decided was, that they had broken a compromise, which he thought a fair one.

Coming to the facts presented by the testimony here, I may say that I know of no authority that the consul has to discharge a seaman for disobedience. I do not mean that he may not and ought not to advise the master, or that the latter may not discharge a man for wilful and obstinate refusal of duty; but that, in a suit for wages, the ultimate responsibility rests on the master, and that the advice of the consul is only evidence, and not a judicial and conclusive finding, that the man ought to be discharged: *United States v. Lunt*, 18 Law Reporter, 683.

The evidence on both sides in this case proves beyond any doubt that the mate was unfit for his office, and that he had given the men just cause to demand their discharge. Indeed, this was conceded; and all the remaining foremast hands, excepting the one promoted to be second mate, were discharged for this cause at Singapore, three weeks after the time now under consideration, and that cause was certified upon the articles, but the cruelty had all been committed on the voyage out to Batavia.

The case for the respondents is, that the libellant and seven others who were discharged at Batavia had agreed to a compro-

mise, by which they were all to go to Singapore and be discharged there; and that the master kept his part of the arrangement, but they broke theirs. This defence is not made out. The evidence is equally clear, and from witnesses on both sides, that the mate was not discharged, even for the three weeks; but that, when the men refused to go to sea from Batavia, the mate was on board, in his working-dress, and apparently occupying his old position. Under these circumstances, the men were justified in refusing to go on. Mariners have a right to leave a vessel on which they are constantly and persistently ill-treated; and by the general maritime law such conduct is not desertion, and they may recover full wages notwithstanding: *The Independence*, Crabbe, 54; *Knowlton v. Boss*, 1 Sprague, 163; *The America*, 1 Blatch. & H. 185. It appears to me that the statute of 1840 has introduced a most important modification of this doctrine; for by the seventeenth clause, 5 Stats. 396, it is enacted, that in all cases where deserters are apprehended the consul or commercial agent shall inquire into the facts, and, if satisfied that the desertion was caused by unusual or cruel treatment, the mariner shall be discharged, and receive, in addition to his wages to the time of his discharge, three months' pay; and the officer discharging him shall enter upon the crew list and the shipping articles the cause of discharge, and the particulars in which the cruelty or unusual treatment consisted, and subscribe his name thereto officially. In construing this statute, it is impossible to maintain that its scope is limited to cases in which deserters are apprehended. The rights of the seamen and of the owners do not depend on the desertion, but on the treatment; else the master, by forcing the crew from the ship without permitting them to see the consul, and then refusing to apprehend them, might rob them of their wages, by treating them as deserters not worthy of being reclaimed. The consul at Singapore took the right course, and discharged the men for cruel treatment by the mate, and noted the cause of discharge upon the articles, though they had not deserted. The statute is a remedial one, and states a general rule under guise of a particular example, as is not uncommon with acts of congress. It cannot be read and understood in any other sense. The rights of the seamen may, in some cases, —

perhaps in this case, — be abridged by this statute, for it gives a certain fixed measure of damages instead of wages to the end of the voyage ; but that it applies to all cases of cruel treatment, by whomsoever the case is brought before the consul, I cannot doubt.

The libellant was clearly and confessedly entitled to his discharge ; and, if he waived it for a time, which is very doubtful, it was upon conditions which were broken by the other contracting party. But even if that breach by the master were not made out, the only contract that the libellant broke was for a trip from Batavia to Singapore. I must therefore award him three months' pay, unless the meaning of the statute is that one-third of this is to go to the United States. Upon the mere language of this clause, it would be plain enough that the man himself is to have the full three months' pay ; but a comparison of the several statutes on the same subject throws much doubt upon it. I am inclined to think, upon the whole, that sect. 26 of the act of 1856, 11 Stats. 62, modifies the seventeenth clause of the act of 1840, if the latter means to give the man the whole of this sum. That section says : That in all cases in which a seaman is entitled to his discharge under any act of congress, or according to the general principles or usages of maritime law, there shall be a payment of three months' wages, excepting only as provided in the ninth clause of the act of 1840 (that is, where a voyage has been prolonged, &c., without any fault of the master) ; and that these extra wages shall be applicable to the same purposes and in the same manner as is directed by the act of 1803, which gives two-thirds only to the mariner, and that subject to certain charges, if he has incurred them. My decree, therefore, will be for two months' wages, or forty dollars, unless the libellant had received advances beyond the wages due him on the 23d of May, 1870, which I did not distinctly gather from the evidence, or unless there is a balance due him on that account to be added to the forty dollars. He is also to have his costs.

Interlocutory decree for the libellant.

 Pratt v. Curtis.

ISAAC PRATT, JR., v. FRANCIS CURTIS & AL.

DECEMBER, 1871.

An assignee in bankruptcy succeeds to the rights of creditors, and may maintain a suit to set aside a deed for fraud, actual or constructive, though the fraud be not one mentioned in sect. 35 of the bankrupt act.

The courts of the United States have jurisdiction in equity to set aside such a deed, though there may be concurrent jurisdiction at law, the remedy at law not being considered in all cases adequate and complete.

A bill in equity by an assignee in bankruptcy, which charged that a debtor made a conveyance for the benefit of his wife and children at a time when he was much embarrassed, and that some of the creditors, at the date of the deed, were still creditors at the date of the bankruptcy, was *held* good on demurrer, though it did not charge that the debtor was insolvent when he made the deed.

It seems, that to render a voluntary deed for the benefit of wife and children fraudulent as to creditors, it would be enough to prove that the grantor was in a doubtful position in respect to solvency.

An assignee in bankruptcy is the proper party plaintiff to impeach a deed given by the bankrupt, though only one class of creditors is interested to set it aside.

If a subsequent purchaser of land, said to have been fraudulently conveyed, is made defendant to a bill to set aside the conveyance, he should be charged to have had knowledge of the fraud.

Two bills in equity by the assignee of the firm of Curtis & Collamore, asking that certain conveyances made by Mr. Curtis about fifteen months before his bankruptcy should be set aside, and for other relief. The first suit related to certain lands in Charlestown, settled in trust for the children of the settlor, and alleged that the deed was voluntary; that Curtis, at the time of the settlement, was indebted to the plaintiff and others, who were still his creditors, and was embarrassed in his circumstances, and that the deed was made with intent to delay and defraud his creditors. The second bill was similar, excepting that it related to other lands, and that the conveyance was alleged to be for the benefit of the wife of Mr. Curtis, and that a purchaser of the lands from the trustees was made a party defendant. Demurrers were filed to both bills.

H. C. Hutchins & H. H. Currier, for defendants. 1. The bill does not allege the particular provision of the bankrupt act on which the plaintiff relies. Nor does it allege title in the

assignee. Both of these things are essential in good pleading. *Re Broome*, 3 B. R. 90; *Bean v. Brookmire*, 4 id. 57.

2. A conveyance is not fraudulent or void simply because it is voluntary, nor because the grantor is more or less indebted: the bill should show that the property conveyed was unreasonable in amount, or that the remaining assets were not sufficient to pay the debts existing at the time of the conveyance, or some other kindred allegation. *Sexton v. Wheaton*, 8 Wheat. 229; *Hinde v. Longworth*, 11 id. 199; *Babcock v. Eckler*, 24 N. Y. 622; *Sedwick v. Place*, 5 N. B. R. 168, and cases there cited; *Salmon v. Bennett*, 1 Conn. 525; *Thacher v. Phinney*, 7 Allen, 150; *Lerow v. Wilmarth*, 9 id. 386; *Winchester v. Charter*, 12 id. 606; s. c. 97 Mass. 140; 102 id. 272.

3. The assignee in bankruptcy represents all the creditors, and there is nothing in the bills to show that many of the debts are not subsequent in date to the deeds. If they are, the allegations ought to be sufficient to avoid the deed as against the creditors who hold these debts, or the assignee has nothing to do with the fraud.

4. There is no allegation that Wiswall was not a *bona fide* purchaser without notice. If he was, the action cannot be maintained against him. 3 Washburn on Real Prop. 226, 296, 297; 1 Story, Eq. §§ 432 b, 434; *Enders v. Williams*, 1 Met. (Ky.) 346; *Salmon v. Bennett*, 1 Conn. 525.

5. The remedy is at law. *Woodman v. Saltonstall*, 7 Cush. 181. *M. F. Dickinson, Jr.*, for plaintiff.

LOWELL, J. 1. In the courts of this State an assignee in insolvency must proceed at law for lands conveyed in fraud of creditors, unless the rights of more than two parties are involved, or some peculiarly equitable relief is required. But the equitable jurisdiction of the courts of the United States does not depend altogether upon the remedies given by the State courts. It is substantially the same throughout the country, and very nearly the same now that it was in 1789; and nothing is better settled than that this jurisdiction exists in those cases in which the chancery courts in England have concurrent jurisdiction with the courts of common law, and notably of bills by creditors to set aside deeds said to be voidable by them. *Shelton v. Tiffin*,

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6 How. 163 ; *Bean v. Smith*, 2 Mason, 252 ; *Hagan v. Walker*, 14 How. 29. In respect to the second bill, it was admitted at the bar that the remedy at law might not be adequate ; because, if Mr. Wiswall was a *bona fide* purchaser without notice, the trustees might still be held to account in equity for the purchase-money, though the land would be beyond their reach : *Hubbell v. Currier*, 10 Allen, 337. But the decisions in the federal courts do not turn on any such distinction.

2. The objection that the bill ought to point out the particular section of the bankrupt law which gives the plaintiff a right to set aside the deeds, is not sound. The plaintiff is to set out facts, and it would be bad pleading to allege the law. Perhaps the meaning of the objection is that the assignee in bankruptcy cannot avoid any transfers of property, but such as come within sect. 35, which these deeds do not, because they were made more than six months before the bankruptcy. This is a mistake. That section refers only to frauds on the act itself ; but the assignee can, as a general rule, avoid any conveyances which the creditors could avoid. Thus in *Carr v. Hilton*, 1 Curtis, C. C. 233, it was decided that an assignee under the bankrupt act of 1841 could maintain a bill of this kind relating to lands conveyed by fraud before the passage of the act, although that act did not mention conveyances in fraud of creditors. So, under an insolvent law which had no express provision on the subject, *Parke, B.*, said, " A deed which is void as against creditors is void as against those who represent creditors : " *Doe v. Ball*, 11 M. & W. 531. The bankrupt act, at sect. 14, vests in the assignee " all the property conveyed by the bankrupt in fraud of his creditors, " — being intended, I suppose, to meet any possible doubt that might remain, notwithstanding the decisions.

3. Does the bill state a case of fraud on creditors ? The defendants, very justly, draw a distinction between creditors at the time of the conveyance and those who become such afterwards. Under our laws, which require the recording of deeds for the very purpose of notifying creditors as well as purchasers, this general distinction, which is admitted in England, is highly just and equitable. It has been fully adopted by the courts of the United States in the cases cited. It is, however, the statute of

13 Eliz., as adopted and construed in Massachusetts, which governs this case; and I have, therefore, examined the decisions of the State with some care. From them I derive the following propositions: 1. A voluntary conveyance to a wife or child is not fraudulent *per se*; but it is a question of fact in each case whether a fraud was intended. 2. Such a deed made by one who is considerably indebted is *prima facie* fraudulent, and the burden is on him to explain it. 3. This he may do by showing that his intentions were innocent, and that he had abundant means, besides the property conveyed, to pay all his debts. 4. If the deed was not in fraud of existing creditors, the burden of proof is on the subsequent creditors to show a fraud on them. *Thacher v. Phinney*, 7 Allen, 146; *Lerow v. Wilmarth*, 9 id. 382; *Winchester v. Charter*, 12 id. 606; s. c. 97 Mass. 140; 102 id. 272.

These bills do not allege the facts which would be necessary to show a fraud on subsequent creditors only; but the rule is, that, if a deed is avoided by antecedent creditors, the land or its proceeds goes to creditors generally: *Walker v. Burrows*, 1 Atk. 94; *Townshend v. Windham*, 2 Ves. Sen. 11; *Jenkyn v. Vaughan*, 3 Drew. 419; *Whittington v. Jennings*, 6 Sim. 493. The case last cited went this length, — that a creditor whose account had been running when the voluntary settlement was made might set it aside, though the items of debt at the date of the deed had all been paid, the balance having always been increasing. I am not aware that the precise point has arisen in Massachusetts; but the *dicta* support the plaintiff's view, that if a conveyance is fraudulent as to existing creditors, it is so as to all: *Winchester v. Charter*, 12 Allen, 609, *per Bigelow, C. J.* In England, there appears to be another rule in equity, that if there be nothing to impeach the settlement, excepting that it is voluntary, and no intent to defraud subsequent creditors is proved, they will not be permitted to impeach the deed, without showing one or more antecedent debts outstanding when the bill is filed: *Holloway v. Millard*, 1 Mad. 414; *Lush v. Wilkinson*, 5 Ves. 384. This doctrine is not easily to be reconciled with the other, nor with principle; because it makes the validity of the conveyance depend on matters arising *ex post facto*. It probably gained a footing in the courts at a time when all such conveyances were

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held to be absolutely fraudulent in law as against existing creditors, and was a sort of equitable mitigation of the rigor of that doctrine. Whether this is the law here I do not now inquire, because this bill alleges the existence of antecedent debts. Whether the grantor must be actually insolvent at the time, in order to render the conveyance fraudulent against existing creditors, has been disputed. In *Winchester v. Charter*, 12 Allen, 609, *Bigelow, C. J.*, says that a voluntary transfer of property by a person deeply indebted, and whose property was inadequate "or barely sufficient" for the payment of his debts, would furnish strong presumptive evidence of fraud. At another place on the same page, he says it is necessary to show that he was indebted beyond his probable means of payment. In *Parish v. Murphree*, 13 How. 100, *McLean, J.*, says, that, in case of a merchant, insolvency need not be proved: it is enough to show that his situation was such that a prudent man, with an honest regard to the rights of his creditors, could not have made such a settlement. I am much inclined to believe that if insolvency were distinctly proved as matter of fact, the intent to defraud existing creditors would follow as matter of law, because one who undertakes to make a voluntary conveyance must be presumed to know the state of his affairs. *Christy v. Courtenay*, 13 Beav. 96. It has been so held even in cases of preference; but the argument applies much more strongly to a gift, because a trader may often make payments of just debts in the ordinary course of business without any thought of his standing in respect to other creditors; but in making a gift, he undertakes to say that he is in a position to make it with justice to them. On the other hand, if insolvency is not clearly shown, the true inquiry, perhaps, is that put by Mr. Justice McLean, whether a prudent man, having a just regard to the rights of his creditors, would have permitted himself to do the act. These bills do not allege insolvency; but all the cases agree that if the grantor is much indebted, or is embarrassed, the burden of proof is on him to explain the transaction, if questioned by existing creditors; and these facts are alleged. It follows that the bills are sufficient to require the respondents to answer, unless their objection, that the deeds can be set aside only to the extent that may be necessary to pay

antecedent debts, and that the assignee cannot work out this equity, is well taken. We have already seen that the doctrine of courts of equity in England is, that if the deed is set aside the property becomes assets. I do not decide this point, however, because, in my opinion, the assignee in bankruptcy, and he only, has the right to impeach the deed in the interest of any class of creditors. Many cases might arise in which the only difficult point to be decided would be whether all the creditors, or only certain of them, were interested; and, upon the theory of the defence, it would depend upon the decision of that point whether the suit should stand or fall, though it was clear that the deed was fraudulent as to some creditors; while, if the assignee can bring the suit in either event, that difficulty is obviated. Assuming, therefore, that the law will only require antecedent creditors to be indemnified, for which I have not yet seen the authority, I rule that the assignee in bankruptcy is the only proper party plaintiff to impeach the deed: *Beals v. Clark*, 18 Gray, 18.

The second bill is defective, so far as Mr. Wiswall is concerned, in not alleging distinctly his participation in or knowledge of the fraud. He is not a necessary party to the bill; because the other defendants may be required to account for the proceeds of the sale to him, although his title should be found or be admitted to be unimpeachable. Indeed, *Marshall, C. J.*, has said, in such a case, that no decree ought to be made against a purchaser, so long as there were volunteers before the court who were able to pay the debt. *Hopkirk v. Randolph*, 2 Brock. 132.

The demurrer is sustained as to the defendant Wiswall, with costs, unless the plaintiff chooses to amend within ten days, upon the terms of paying his costs up to this time.

The other defendants are to answer over in two weeks, their demurrer being overruled.

The Hyperion's Cargo.

THE HYPERION'S CARGO.

DECEMBER, 1871.

By the maritime law a master has a lien upon the cargo for demurrage, and such a lien may be enforced in the admiralty.

This, although demurrage was not expressly stipulated for in the bill of lading.

An ordinary bill of lading implies an agreement that the goods shall be received within a reasonable time after the arrival of the vessel at her port of destination.

LOWELL, J. The libellants' right to freight is not contested ; but it is said that there can be no recovery for demurrage, because no express contract was made concerning it, and the law will not imply one against a consignee : *Gage v. Morse*, 12 Allen, 410, is cited as conclusive on this point. That case decided that a consignee, merely as such, does not, by accepting the goods, make an engagement with the master that he will receive them at any particular time, unless there is something on the face of the bill of lading fixing the time. Judge Betts came to the opposite conclusion in a case in which the consignee was the owner of the cargo : *Sprague v. West*, Abb. Adm. 548. The case at bar resembles in its circumstances that before the court in New York ; for I understand the title to this coal to have been in the claimants from the time it was loaded on board the Hyperion, if not before. But I am not concerned here with the question whether the claimants are personally responsible for demurrage, but with the liability of the cargo to such a demand. There is no doubt that the shipper of goods by an ordinary bill of lading impliedly agrees that they shall be received at the port of destination within a reasonable time after the arrival of the vessel, according to the usual course of the trade. By the common law the master has no lien upon the goods, as security for this obligation. In my opinion he has such a lien, or, more strictly speaking, such a privilege, by the maritime law, and that it may be enforced in the admiralty. It is a maxim of the general law-merchant that the ship is bound to the merchandise, and the merchandise to the ship. Pardessus, Droit Com. arts. 709, 961 ; Valin, Comment. book 3, tit. 1, arts. 11, 24 ; Boucher, Droit Marit. §§ 926-934.

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This reciprocal privilege appears to extend to all claims which may arise on the one side or the other out of the contract of affreightment. Thus art. 308 of the French Code de Commerce declares that the captain is privileged before all creditors for the payment of his freight and the averages (*avaries*) that are due him. The word *avaries* I understand to include all damages which the master may lawfully demand in the premises. Indeed, the distinction between liquidated and unliquidated damages is unimportant in those jurisdictions in which the master's lien is a privilege to be enforced by the courts, and not a mere right of retainer; for the courts can deal as readily with the one kind of damages as with the other. I have found no exception of any class of charges or damages; and though the term *avaries* is the most common, yet "debts" and "expenses" and some other expressions are used, showing that "averages" has no technical signification. See Pardessus, n. 6 to art. 24 of the Laws of Oleron, 3 Pard. Collect. 345; Id. Code of Charles XI. of Sweden, 3 Pard. Collect. 158. Indeed, the learned author whom I have so often cited says that the master contracts rather with the merchandise than with the shipper; and he has his privilege for the freight even against the true owner of the goods, though they had been stolen, Pard. Droit Com. art. 961; and Valin says, that the contrary opinion is absurd, Valin, *ubi supra*. I quote this example to show that the privilege does not depend on any doctrine of agency, as well as to fortify my opinion that the merchandise is liable for whatever the shipper is liable for.

When the common law of England was modified by the introduction of many rules from the law-merchant, the former law had no process for enforcing this reciprocal privilege of the ship and the goods, and had succeeded in repressing the only court that had the requisite modes of action; and was, therefore, obliged to say that it could not recognize the maxim, even when embodied in express contract, as it usually is in English charter-parties: *Birley v. Gladstone*, 3 M. & S. 205; *Gladstone v. Birley*, 2 Meriv. 401. From the time of those decisions to that of *Gray v. Carr*, L. R. 6 Q. B. 522, the history of this question in the courts of common law in England has been that of a struggle between ship-owners to create liens by stipulation, espe-

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cially liens for demurrage, and of the courts to narrow the stipulations by construction. See *Phillips v. Rodie*, 15 East, 547; *Faith v. E. I. Co.*, 4 B. & Ald. 680; *How v. Kirchener*, 11 Moore, P. C. 21; *Tindall v. Taylor*, 4 Ellis & B. 219; *Bishop v. Ware*, 3 Camp. 360. In nearly all those cases the obvious intent of the parties has been disregarded, and a remedy refused for a violated right. In this country the courts of admiralty have retained their proper jurisdiction, and can enforce the privilege, by which-ever party this action may be invoked. *Dupont de Nemours v. Vance*, 19 How. 162; *The Belfast*, 7 Wall. 624; *The Maggie Hammond*, 9 id. 450. Cases in which the cargo has been libelled for freight are numerous, *The Volunteer*, 1 Sumner, 551; *Certain Logs of Mahogany*, 2 id. 589; *The Spartan*, 1 Ware, 134; *The Salem's Cargo*, 1 Sprague, 389; *The Eliza's Cargo*, 1 Lowell, 88; and so of a contribution for general average and other demands, *Cargo of the George*, Olcott, 89; *Bags of Linseed*, 1 Black, 108; *The Convoy's Wheat*, 3 Wall. 225. The only question of any difficulty is, whether the privilege extends to demurrage not expressly stipulated for in the bill of lading. Upon this point the cases at common law do not afford much aid; because they recognize no general responsibility of the goods to the ship, but only a right of retainer, which, they say, cannot be conveniently exercised in support of a demand for unliquidated damages, — a point of no consequence in the admiralty: *Sprague v. West*, Abb. Adm. 548. Nearly all salvage claims against cargo are unliquidated. We uphold libels against the ship every day in behalf of the merchant for unliquidated damages to his goods; and there is no reason for not doing so, on the other side, for damages in not receiving the goods in due season. My own conviction is that the privilege of the ship-owner in the admiralty is not limited by the master's lien at common law, but depends on the law-merchant, and that by the law-merchant the privilege extends to all charges, damages, and expenses arising out of the affreightment.

The evidence in this case is plenary, that the cause of the delay at the wharf was the lack of cars to take away the coal; that it might easily have been taken out and received at the rate of one hundred tons a day, which is the rate usually agreed on in the

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trade, but that the consignees wished to receive it in the cars. They refused to receive it in any other way, and said they would pay the freight when it should all be out, but no demurrage. The master was justly angry at this language, and brought his libel. I am much inclined to think his action for the freight was premature; though not for demurrage, which accrues from day to day; but as the claimants admit a liability for the freight, and the libellants admit that part of the demurrage they now ask for was not due when the libel was filed, it seems to me just to give to the libellants their whole damages, but without costs. A libel will not be dismissed merely because it was brought too soon, if substantial justice can be done, and ought to be done, under it: *The Salem's Cargo*, 1 Sprague, 392; *The Isaac Newton*, Abb. Adm. 11; *The Magoun*, Olcott, 55. Here, as in the case before Judge Sprague, the cargo is now beyond the reach of process, and therefore the libel ought to be retained.

A specification of the libellants' damages, which was used at the trial, shows that they ask for twelve days' demurrage. Upon the evidence, it seems to me that the vessel was delayed at least that length of time by the want of cars, and I shall give damages at thirty dollars a day for the twelve days.

Decree for libellants.

In re D. PRATT.

JANUARY, 1872.

A person cannot commit an act of bankruptcy while insane; but if when sane he has committed such an act, he may be made bankrupt upon a petition *in invitum*, after he has become insane.

Whether he can obtain a discharge, *quære?*

LOWELL, J. Pratt committed an act of bankruptcy and afterwards became insane, and a petition for adjudication is filed against him by one of his creditors. A guardian has been duly appointed for him under the laws of Massachusetts, who appears, and consents to the adjudication. So far as any cases are reported which touch the standing of a lunatic in a court of bank-

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ruptcy, they decide that such a person cannot commit an act of bankruptcy while lunatic; but that if while sane he has committed such an act, he may be made bankrupt after he has become lunatic. Robson on Bankruptcy (1st ed.), 84; *Anon.*, 13 Ves. 590, and Mr. Sumner's note; *Ex parte Stamp*, De Gex, 345; *In re Marvin*, 1 Dillon, 178.

This appears to be a reasonable distinction, and conformable to the law in civil matters generally. It is highly important to the bankrupt's creditors that they should not be left to a race of diligence, which has all the objections which can be found to a proceeding in bankruptcy, besides others of its own; and the rights of the bankrupt will be fully protected by his guardian. Whether he can obtain a discharge, if unable to take the oath prescribed by the statute, and unable to submit himself to examination, I will not now say. If not, he will be no worse off than if he had not been made bankrupt, while his creditors generally will be much better off.

Decree of adjudication.

H. M. Rogers, for the petitioner.

Re THE INDEPENDENT INSURANCE COMPANY.

JANUARY, 1872.

A decree of a State court enjoining a corporation from further prosecuting its business on the ground of insolvency, and appointing receivers, does not oust the jurisdiction of the district court to adjudge the corporation bankrupt.

A CREDITOR of the Independent Insurance Company, a corporation established under the laws of Massachusetts, filed his petition in January, 1872, alleging that the company was insolvent, and had made certain fraudulent preferences.

On the return-day a suggestion was made by the receivers appointed by the supreme judicial court of the commonwealth, which suggestion afterwards took the form of a plea to the jurisdiction, by which it was alleged that, in December preceding, application was made to the State court to have the corporation

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enjoined from further prosecuting its business, on the ground of insolvency; and that earlier on the same day that the petition was filed in this court, a decree, making a preliminary injunction, previously issued, perpetual, was entered in the State court, and receivers were appointed to take possession of and distribute the assets of the company.

C. I. Reed, for the receivers. There can be no doubt of the power of a State to dissolve a corporation of its own creation; and this has been lawfully done in the case of the Independent Insurance Company. The effect of such a dissolution is to stay all suits and to render all future judgments erroneous. It is in strict analogy to the death of a natural person: *Mumma v. Potomac Co.*, 8 Pet. 281; *Curran v. Arkansas*, 15 How. 304; *Bacon v. Robertson*, 18 id. 480; *Merrill v. Suffolk Bank*, 31 Maine, 57; *Greeley v. Smith*, 3 Story, 657.

H. W. Paine & J. O. Teele, for the petitioning creditor. 1. The supreme court of Massachusetts has denied the power of the supreme court of New York to dissolve a corporation under like circumstances with these, and under a statute which cannot be distinguished: *Folger v. Columbian Ins. Co.*, 99 Mass. 267.

2. The insolvent laws of the State, whether general or special, are superseded by the bankrupt act; and the bill of the insurance commissioners, which alleges merely the insolvency of this company, is nothing but a sort of petition in bankruptcy. In whatever way we take it, the jurisdiction of this court is full and exclusive: *Thornhill et al. v. Bank of Louisiana*, 5 N. B. R. 367; *Re Merchants' Ins Co.*, 6 id. 43.

B. Sanford, for the corporation, filed an answer, submitting to the jurisdiction, and admitting the acts of bankruptcy.

LOWELL, J. The questions necessarily presented by this case do not appear to be difficult of solution; and as the affairs of the company are said to need attention, I have determined to dispose of them without delay. The somewhat startling proposition is made, that by the decree of the supreme court of the commonwealth, dissolving the corporation, the whole jurisdiction in bankruptcy is foreclosed, and the general creditors must be content to take such assets as remain within the reach of the State process, and to leave all extra-territorial property to the

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mercy of attaching creditors, and all payments which would have been preferences under the bankrupt act to be mere payments in full of so many debts of the company. The corporation is extinct, it is said, and its property has reverted to the State, which never owned it, or to those who happen to be in possession of it at the moment of the dissolution. This view would be equally fatal, of course, to the title of the receivers, and to the suit under which they are acting, as to all other suits and proceedings. They felt the pressure of this situation; for the learned and able counsel who represented them said that he was not sure whether he occupied any other relation to this case than that of an *amicus curiæ*, suggesting the death of the supposed bankrupt.

The cases cited for this position do not support it. One of these cases is *Curran v. Arkansas*, 15 How. 304, in which Mr. Justice Curtis cites, with approval, a note to 2 Kent, Com. 307, to the effect that this doctrine is obsolete; and all the other cases, excepting two decisions at common law, lay down the rule that a corporation, however it may be dissolved, still exists for the purpose of paying its debts, and of dividing its surplus, if any, among its shareholders, or of having this done by a court of equity. These two cases do say that a judgment at law cannot be lawfully rendered against an extinct corporation; but I have yet to learn that a petition in bankruptcy is an action at law. It is an equitable sequestration, more so than the bill under which the receivers were appointed, in this, that it has a wider reach and a more effectual operation. If it were not, it would make no difference; because the statute of Massachusetts agrees with the doctrine of chancery, and extends it to cases at law, by enacting that all corporations whose charters expire by limitation, or are annulled by forfeiture or otherwise, shall nevertheless be continued bodies corporate for three years, for the purpose of prosecuting and defending suits, and settling their affairs, &c. Gen. Sts. ch. 68, § 36. The charter of this corporation has either been annulled by forfeiture or otherwise, or it is in full vigor; and in either event the corporation may prosecute and defend suits, excepting as restrained by a court of competent jurisdiction.

I do not intend to enter into any race of diligence, or any con-

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troverſy concerning jurisdiction, until I am obliged to do ſo. If I ſee the ſupreme judicial court exerciſe a power, I ſhall aſſume it to exiſt, though I may not perceive very clearly the ſource from which it is derived. Granting, then, for the purpoſes of this hearing, that the State law by which inſolvent inſurance companies are wound up is not, ſo far as the mere winding up is concerned, ſuſpended by the bankrupt law, not even at the demand of the creditors, and that the jurisdiction is co-ordinate, it is yet certain that the decree of the ſupreme judicial court was not intended by that court to operate, and does not operate, to take away the jurisdiction of this court in bankruptcy. I find in it no injunction againſt a petition in bankruptcy, even by the corporation, and, of courſe, none addreſſed to creditors; and I do not ſuppoſe that court would undertake to enjoin ſuch a proceeding. It ſimply forbids the company to carry on buſineſs, except in aſcertaining loſſes and cancelling policies. Nay, more, if the power of the receivers is as extenſive as it is ſaid to be, it would be their clear duty under the decree to put the corporation into bankruptcy, ſince they can in no other way carry out the true intent of the decree, which is, that the property ſhould be equally divided among all the creditors. If we adopt the bold metaphor of the argument, that the defendant is dead, and the funeral rites alone remain to be ſolemnized, we ſhall find that only in this place can they be adequately performed.

The caſes of *Taylor v. Carryl*, *Freeman v. Howe*, and others, which maintain that, when the courts of one jurisdiction have poſſeſſion of the *res*, no others can interfere with it, have no application; becauſe, from its conſtitution and powers, the ſupreme judicial court cannot have full poſſeſſion of the *res*, and does not profeſs to have it. It knows no ſuch thing as a preference; it cannot deal with property out of the State; and there therefore remains, and muſt remain, in every caſe, a poſſible *res* for this court to act on, even if the jurisdiction is concurrent or co-ordinate. That *res* is ſhown to exiſt in this caſe.

I have not conſidered with care the queſtion whether the aſſignees will be entitled to the property. If they are, they

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can undoubtedly obtain it by application to the supreme judicial court, should the receivers be in possession, of which I am not advised, and refuse to resign it, which I do not expect. If the decree there should be against them, they can have a writ of error to Washington; or they may, I suppose, sue the receivers in a personal action, though not by replevin, in the courts of the United States. I cannot doubt that full and speedy justice will be done them in either jurisdiction. Finding, as I do, that this corporation still exists for the purpose of being proceeded against here, and that its creditors have not been enjoined from proceeding, nor the corporation from defending or being defaulted, and that it admits the acts of bankruptcy alleged against it, I adjudge it to be bankrupt, and order a warrant to issue, as provided by law. *Adjudication ordered.*¹

F. G. WHISTON v. A. E. SMITH ET AL.

JANUARY, 1872.

In equity, the court may give effect, upon equitable terms, to the valid part of a contract which is fraudulent in part.

This doctrine applied to a mortgage which was, in part, a preference.

A person who advances his own money for the fees in bankruptcy has a first lien on the assets for its repayment. A mortgage to secure the advance gives no additional security, and is useless.

BILL IN EQUITY by the assignee of one Gray, to set aside two mortgages on the whole stock of goods of the bankrupt as preferences. One of the mortgages was given to A. E. Smith to secure an old debt of \$1,200 and a new advance of \$300. Smith already held a mortgage on the same stock for the old debt, but it was given within four months of the bankruptcy, and was not of importance, except as it might bear upon intent. The security to Payne, the other defendant, was given to indemnify him for advancing the fees in bankruptcy, and was so expressed.

¹ Affirmed, 1 Holmes, 103.

The case was submitted without argument by *J. O. Teele*, for the plaintiff, and *J. D. Thomson*, for the defendants.

LOWELL, J. Mr. Smith was a partner with the bankrupt, and left in the business \$1,000, because it would destroy the business to withdraw it. All the evidence shows that Gray was insolvent, and that Smith must have known it. Indeed, a creditor who takes security upon the whole stock of a trader for an antecedent debt has never yet succeeded, in any case within my knowledge, in explaining the transaction, excepting by evidence of the actual solvency of the trader at the time; such a mortgage is taken at the risk of bankruptcy occurring within four months. A nice question is, whether the mortgage ought to stand as valid for the \$300. In *Denny v. Dana*, 2 Cush. 160, a mortgage bad in part, because given by way of preference, was held to be wholly void. And it has been held that where an old mortgage was cancelled, and a new one taken, which was partly on newly acquired property, and was void for preference, the mortgagee could hold under neither: *Paine v. Waite*, 11 Gray, 190. These were cases at law. The rule in equity is very different. In that jurisdiction one may always hold by his best title, and a cancelled security which was valid will not be merged in a new one which is void. There are many decisions that, in the absence of a fraud in fact, participated in by the holder, a security may stand good for part and be rejected for the remainder. See, per Swayne, J., *Clements v. Moore*, 6 Wall. 299, 312, and the cases there cited; and *Herschfeldt v. George*, 6 Mich. 456; *Worthington v. Bullitt*, 3 Md. Ch. 99, affirmed 6 Md. 172; *Boyd v. Dunlop*, 1 Johns. Ch. 478; *Bean v. Smith*, 2 Mason, 296.

This is a case for the application of that practice; for the evidence is that the new mortgage was taken as a matter of convenience, and the transaction, though a preference as to the old debt, under the decisions, was not fraudulent in the usual sense of that term. The mortgage may, therefore, stand as security for the advance of \$300.

The mortgage to Payne was unnecessary, because a person who in fact advances his own money for the fees in bankruptcy has a first lien on the assets for its repayment. Payne's

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mortgage is of no use to him, and, whether it should be affirmed or annulled, he has a right to receive back his lawful advances.

Decree that the mortgage to the defendant Smith is a valid security for the \$300 advanced October, 1871, and interest, and invalid as to all other sums purporting to be secured by it; that Payne has a right to be reimbursed out of the assets any sums he may have advanced, for proper fees in bankruptcy; that the assignee have power to sell the mortgaged property, free of the incumbrance of the mortgages, and that he pay into court for the use of the defendants the sums so due to them respectively, and keep the remainder as assets in the bankruptcy. If there should be any dispute as to the amounts, they can be settled before the final draft of the decree.

THE A. M. BLISS.

MARCH, 1872.

The district court has full jurisdiction of all contracts of affreightment and of claims for indirect as well as direct damages for the violation of them.

There is no lien upon a vessel for loans made on a pledge of the freight as security. Where agents of a vessel, who were part owners, chartered the vessel to a creditor of their own, to enable him to repay himself out of the earnings, — *Held*, the charter-party was void as against the vessel and the other owners.

AFFREIGHTMENT. — Libel by A. S. Lewis and others, composing the mercantile firm of A. S. & W. G. Lewis & Co., against the schooner A. M. Bliss, alleging that they hired the vessel of Patton, Ginn, & Folger, of Boston, agents and owners, for six voyages to Hayti or other parts of the West Indies, or the Salt Islands, at \$1,200 for each voyage, and that the vessel had performed only two of the voyages, and that her master and said agents refused to send her on the third voyage; that the libellants had advanced, on account of the freight, \$2,200 more than had been already earned, which sum, with other damages, they sought to recover. An amendment was filed, by consent, averring that the libellants had settled the two voyages,

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and had, besides, advanced \$3,000, by their acceptance drawn on account of the charter, which they were liable to pay at any time, and that other charges to the amount of \$350 had accrued on the same account.

The master appeared and claimed the vessel, and in his answer denied the authority of the supposed agents to make the charter, and set up that it was a fraud on the other owners, and that the libellants participated in the fraud; denied that he had absolutely refused to make the third voyage, but said that he offered to make it if the libellants would settle for the former voyages, and would pay the future freight to the owners.

There was much conflict of evidence concerning the master's knowledge of the charter-party, the authority of the agents, and the good faith of the transaction; and there was some discrepancy and contradiction concerning the amounts, dates, &c., of advances said to have been made. The dealings were between Patton of the one part, and W. G. Lewis of the other; and there was some testimony from both of them that a considerable part of the charter-money was to be applied to liquidate old debts of Patton, or of his former firm of Patton & Ginn, to the libellants themselves, or to one of them. Patton & Ginn were now bankrupts. The charter-party contained several clauses that were commented on as unusual, and as showing fraud; among others, that a commission of five per cent should be payable to the charterers, and two and a half per cent to the agents "on the signing lost or not lost on any voyage," and that the agents agreed to sign charter-parties at the beginning of each voyage for such terms as Lewis & Co. might direct, without prejudice to any clause of the original charter-party; and that the charterers might cancel the charter-party at the end of any voyage. On the other hand, there was evidence that the right to cancel was not unusual in the Haytien trade, and was reasonable, owing to the peculiar vicissitudes of that business. The right to insert a different rate of freight in the voyage charters was said to be intended to enable the charterers to charge their correspondents abroad more than they really paid for the schooner, if the market rate of freights should advance.

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J. W. Hudson, for the libellants.

J. C. Dodge, for the claimant.

LOWELL, J. The arguments of counsel have turned so much upon the important matters of fact involved in the controversy, that they have almost overlooked the point raised by the answer, whether, upon the libellants' own case, they have a lien on the ship. The district court has full jurisdiction of contracts of affreightment, whether evidenced by charter-party or bill of lading; and though the damages may, in any case, be somewhat indirect, as, for instance, if they arise out of a jettison which requires contribution, or out of a fraudulent payment of salvage by the master, yet the mode in which the claim for compensation arises will not oust the jurisdiction: *Dupont de Nemours v. Vance*, 19 How. 162; *Church v. Shelton*, 2 Curtis, C. C. 271; *The Panama*, Olcott, 343. If, then, the fact were as is alleged in the libel, that an advance of the freight had been made by the charterers in accordance with the terms of the contract, the advance would, in the absence of an express agreement to the contrary, be recoverable of the owners, if the ship should, for any reason, fail to perform the voyage; and this right might be enforced against the ship: *The Panama*, *ubi supra*; *The Pacific*, 1 Blatch. 569. But I understand that the advances, so called, in this case, were not advances of freight, but loans on a pledge of the freight, which is a very different thing. In the one case, there could be no recovery, unless the voyage failed; and, in the other, the borrowers would be bound to repay the money in any event, and the lenders would have merely a right to security on the freight. Such a loan does not purport to pledge the ship, but only the freight; and there is no lien on the ship for its repayment, because the failure to pay is no breach, express or implied, of the charter-party, but only of a distinct contract of loan, in which the promise of the borrower is the principal obligation. In this respect the charterers are on no different footing from any other person who should lend money to the ship-owner on a pledge of freight. The ship is bound to the due performance of the contract of hiring, including, perhaps, the repayment of freight advanced on the charter; but it is not bound to the performance of a collateral agreement to repay money lent on the faith that

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all the covenants of the charter will be kept. The distinction may seem a nice one, but it appears to me to be plain and indisputable.

My duty, however, requires me to go further, and examine the legality of the contract itself; because I may have misunderstood the facts on which I decide that no privilege is held against the vessel, but more especially because some damages are testified to which do undoubtedly have such a privilege, if the charter be a binding contract. It is said, indeed, that the master never refused to perform his part of the charter, excepting upon terms, which he had a right to insist on, of a settlement of each voyage when it was ended; but his right to a settlement, or, at least, to any thing more than a mere statement of the account, depends on whether the charterers had already lawfully paid or lent to the authorized agents of the vessel much more than had been earned at the time of the dispute, which involves the whole merits of the case. I cannot understand the libellants' witnesses otherwise than that a great part of the very large sum which was to be lent or advanced was to go to pay the old debts of Patton & Ginn to the charterers, or one of them. Indeed, it is scarcely credible that so large an advance as is mentioned in the memorandum — more than twice what the libel alleges — could be made under any ordinary circumstances, especially on a charter which the lenders might wish to cancel at the end of some one of the voyages. That the amount was so large; that the agreement for it, which really preceded the charter, was not embodied in it; that some indefinite part of the money was appropriated to the old debts, and no definite part was testified to as having been applied to any thing else, — all lead me to the conclusion that this was the true intent of the transaction. The evidence certainly tends somewhat strongly to throw a doubt on any advances having been made at all, excepting of one sum of \$850, which, perhaps, had been earned before it was paid, and was not truly an advance. But this is consistent with the other theory, for it shows that the parties intended to settle every thing by an adjustment of accounts; which, if Patton & Ginn had been the only owners of the schooner, would have been a very proper arrangement, but actually involved an abuse of the agency, which the libellants must be held to have known, for they were bound to inquire into

 United States v. 1,291 Bales of Tobacco.

the ownership of the vessel before undertaking to pay themselves out of the earnings. I have no hesitation in saying that the charter-party was void as against the vessel and all the owners excepting Patton & Ginn. *Libel dismissed with costs.*

 UNITED STATES v. 1,291 BALES OF TOBACCO.

MARCH, 1872.

An importer who, for illegality, has forfeited his goods to the United States, loses the whole value of the goods in the home market; this, whether the goods are seized before or after entry.

The forfeiture is the same whether the importer has given a warehousing bond, or has paid the duties, or has neglected to enter them.

When goods are seized in bond, the importer who wishes to have them released must stipulate for the value after the duties are paid, and not merely for their value in bond.

LOWELL, J. Imported goods having been seized in the bonded warehouse for an alleged violation of sect. 3 of the act of 3d March, 1863, 12 Stats. 738, the claimant applies to have them delivered to him in the warehouse, upon his filing a stipulation for value, and that the appraisers be instructed to estimate them at their market price, less the duties. The district attorney maintains that the value should be the full market price. The question has been decided differently by district judges of learning and ability, and this want of agreement will necessitate a new examination of the question. Judge Blatchford's opinion is in favor of the claimant's position, *Four Cases of Silk Ribbons*, 1 Bened. 214; Judges Hoffman and Cadwalader have required the bond to be for the full market value, *United States v. 12,347 Bags of Sugar*, 1 Abb. U. S. 407; *United States v. Segars*, 3 Phila. 517.

Leaving out of view the question of a possible re-exportation of the goods, which I shall speak of later, it is very clear that an importer who has committed some fraud or illegality, by which his goods are forfeited to the United States, loses the full value of his goods at the home market, and not their value less the duties, which is a compromise between the home and the foreign

value. This is admitted to be so if he has paid the duties ; and he is not to be benefited by having smuggled them. The duties form part of the value here ; and whether the goods are seized before or after entry, the importer is personally liable to pay the duties ; and, to avoid circuitry of action, sect. 89 of Stat. 1799, 1 Stats. 696, requires, that, upon his giving a bond for value, he must also pay or secure the duties before receiving delivery of his goods. That section is scarcely more than declaratory of the common law ; because the duties are a debt, and the government has a lien on the goods for it, and there would be an action for the amount, whichever way the suit was decided. It has, therefore, been the usual, as it is the proper, practice to appraise goods seized before entry, or before the duties are paid, at their full market value, and to require the duties to be paid besides. It is an entire fallacy to say that the importer is thus made to pay the duties twice ; for they are a part of the original price, and he does not lose the goods and their price too. Take this case, where the duties are sixty per cent of the whole value. If the importer gives a stipulation for \$40,000, as he asks leave to do, and then forfeits it and pays the duties, he will have lost \$40,000, and not \$100,000, nor \$140,000 ; because he has received goods worth \$100,000, and out of this he has paid his duties, and the forfeiture, which together are exactly that amount, and his loss is the original \$40,000, which represents the prime cost abroad, and the freight and charges, but not the duties ; and the government has received the duties, which it was entitled to in any event, and has then remitted an equivalent amount in favor of a fraudulent importer. The mode of appraisement which I uphold follows inevitably from the principle that the goods are subject to a duty for which the importer is personally liable, and are also subject to forfeiture if illegally imported.

No reason has been given, nor can I find any, why the importer's position should be different, if he has given a bond for the duties, from what it is if he has paid them, or neglected to enter them. Whenever they happen to be seized, his position is the same, — he must pay the duties, if he has not already done so ; and, if he has committed the fraud, he loses the goods, and, if not, he saves them, neither more nor less.

It is admitted that if the government holds these goods, and they are forfeited, the government will receive the full value, and collect the duties besides; but it is insisted that in that event the claimant will lose but \$40,000, though the government will have gained \$100,000. This is a mistake. It is impossible that the government should gain by the forfeiture itself more than the claimant will lose by it, or that the claimant's loss, if he is able to pay his bond for the duties, will be any less than the value of the goods which he forfeits, or that the loss will vary, excepting so far as interest on his payments is concerned, whether the duties are paid before or after the suit is decided, or before or after seizure. The value of these goods in the warehouse, as the district attorney has well shown, is \$100,000, and not \$40,000. A purchaser at the latter price must give satisfactory indemnity against the importer's liability for the duties; and this is, in fact, a part of the price, whatever the form of the sale may be. Such a purchaser, if the goods were forfeited, would lose \$100,000, if the importer could enforce his obligation to pay the duties; but if the fraud of the importer absolved the purchaser from this, then he would lose \$40,000, and the importer would lose \$60,000, which together make up the \$100,000. Neither more nor less, in any event, and by whomsoever borne, will be lost by the forfeiture of these goods than their exact value, unless, indeed, they are now released on a stipulation for less than their value.

If it were true in fact that the value of these goods to the owner is less than their value to the government, it would by no means follow that he should have them by giving bond for the lesser value. It is never a question in judicial controversies of value to the one party or to the other, when there is a market price; but even granting that it were, yet the government, or any one else having possession of property, and being asked to give it up, must have an equivalent. It is nothing to the plaintiff that the defendant does not estimate the property at its full market value, or that it has not cost him so much: he is entitled to that value before he surrenders it; *melior conditio possidentis*.

I have considered the case thus far as if the goods were intended for home consumption; and I apprehend that they must be bonded as if they were so intended, and this for several rea-

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sons. 1. Goods that are warehoused are in fact almost always so disposed of. 2. Goods really intended for re-exportation will not be fraudulently imported, unless in connection with some allied domestic fraud; because there is no motive to commit any fraud in that case. 3. If the rare and improbable case should happen of a fraud, real or suspected, in the importation of such goods, the rule still holds that the owner should give an equivalent for what he receives; and, theoretically, he loses nothing by the application of the rule, because he obtains goods for their exact value. Practically, he may be obliged to make a larger investment than he had intended. But we must have a general rule; and the only safe and reasonable rule is the market value here.

Bond to be given for full value.

W. C. N. SWIFT & AL. v. C. N. GIFFORD.

MARCH, 1872.

Where a boat's crew from whale-ship A. pursued and struck a whale in the Arctic Ocean, and the harpoon, with the line attached to it, remained in the whale, but did not remain fast to the boat, and a boat's crew from ship B. continued the pursuit and captured the whale, and the master of ship A. claimed it on the spot, — *Held*, that an admitted usage that the whale should belong to ship A. under such circumstances was a valid usage.

A like decision was made by Judge Sprague in a case not reported.

LIBEL by the owners of the ship *Hercules* against the agent and managing owner of the *Rainbow*, both whale-ships of New Bedford, for the value of a whale killed in the Ochotsk Sea by the boats of the *Hercules*, and claimed by the master of the *Rainbow*, and taken and appropriated by him, because one of his harpoons, with a line attached to it, was found fastened in the animal when he was killed. The evidence tended to show that the boats of the respondents raised and made fast to the whale, but he escaped, dragging the iron and line, and so far outran his pursuers that the boats' crews of the *Hercules* did not know that any one had attacked or was pursuing the whale when they, being to windward, met and captured him; that the master of the *Rainbow* was, in fact, pursuing, and came up before the

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whale had rolled over, and said that one of his irons would be found in it, which proved to be true; and he thereupon took the prize. The parties filed a written stipulation that witnesses of competent experience would testify, that, during the whole time of memory of the oldest masters of whaling-ships, the usage had been uniform in the whale-fishery of Nantucket and New Bedford that a whale belonged to the vessel whose iron first remained in it, provided claim was made before cutting in. There were witnesses on the stand who confirmed the existence of the usage, and who extended it to all whalers in these seas; and there was nothing offered to oppose this testimony. The only disputed question of fact or opinion was concerning the reasonable probability that the whale would have been captured by the *Rainbow*, if the boats of the *Hercules* had not come up. The value of the whale was said to be about \$3,000.

J. C. Dodge & C. T. Bonney, for the libellants. 1. The rule of law is, that wild animals become property only when fully and actually taken into possession. 2 *Kent's Com.* 239; *Pierson v. Post*, 3 *Caines*, 175; *Buster v. Newkirk*, 20 *Johns.* 75; 2 *Black. Com.* 389-394.

2. The admitted custom, being in contravention of this rule of law, is void. *Dickinson v. Gay*, 7 *Allen*, 29; *Copeland v. Richardson*, 6 *Gray*, 536; *Brown v. Jackson*, 2 *Wash. C. C.* 24; *Thompson v. Riggs*, 5 *Wall.* 663; *Nudd v. Hobbs*, 17 *N. H.* 524; *Constable v. Nickerson*, 14 *C. B. N. S.* 730; *Dodd v. Farlow*, 11 *Allen*, 429; *Reed v. Richardson*, 98 *Mass.* 216; *Leach v. Perkins*, 17 *Maine*, 465; *Hone v. Mut. Safety Ins. Co.*, 1 *Sandf.* 149.

3. The usage is not universal. See the reported cases in England. *Addison v. Row*, 3 *Paton*, App. Cases, 334; *Hogarth v. Jackson*, 2 *C. & P.* 595; *Aberdeen Arctic Co. v. Sutter*, 4 *Macq.* 355; *Fennings v. Grenville*, 1 *Taunt.* 241; *Littledale v. Skaith*, *id.* 243, *note*.

4. The custom is unreasonable.

5. We ought to have salvage, at least.

G. Marston & W. W. Crapo, for the respondent. The admitted usage is valid. The several English and Scotch cases cited by the libellants recognize and uphold a usage not precisely like this, but equally derogatory of the general rule of

law. The very same usage is referred to by Sprague, J., in *Taber v. Jenny*, 1 Sprague, 315, with apparent approbation, and in *Bourne v. Ashley*, decided by the same learned judge, but not reported, the usage was recognized and applied.

LOWELL, J. The rule of the common law, borrowed probably from the Roman law, is, that the property in a wild animal is not acquired by wounding him, but that nothing short of actual and complete possession will avail. This is recognized in all the cases concerning whales cited at the bar, as well as in the authorities given under the first point. Whether the modern civil law has introduced the modification that a fresh pursuit with reasonable prospect of success shall give title to the pursuer, does not seem to be wholly free from doubt, though the ancient commentators rejected such a distinction, for the satisfactory reason that it would only introduce uncertainty and confusion into a rule that ought to be clear and unmistakable. See Pandects, by Pothier, vol. xvi. p. 550; lib. 41, tit. 1; Gaius, by Tompkins & Lemon, p. 270. I do not follow up this inquiry; because it would be impossible for me to say that the crew represented by the respondent, though continuing the chase, had more than a possibility of success.

The decision, therefore, must turn on the validity of the usage, without regard to the chances of success which the respondent's crew had when the others came up. It is not disputed that the whalers of this State, who have for many years past formed, I suppose, a very large proportion of all those who follow this dangerous trade in the Arctic seas, and perhaps all other Americans, have for a very long time recognized a custom by which the iron holds the whale, as they express it. The converse of the proposition is that a whale which is found adrift, though with an iron in it, belongs to the finder, if it can be cut in before demand made. The usage of the English and Scotch whalers in the Northern fishery, as shown by the cases, is, that the iron holds the whale only while the line remains fast to the boat; and the result is, that every loose whale, dead or alive, belongs to the finder or taker, if there be but one such.


The validity of the usage is denied by the libellants, as overturning a plain and well-settled rule of property. The cases cited

in the argument prove a growing disposition on the part of the courts to reject local usages when they tend to control or vary an explicit contract or a fixed rule of law. Thus Story, J., in *The Ree-side*, 2 Sumner, 569, says, "I own myself no friend to the almost indiscriminate habit of late years of setting up particular usages or customs in almost all kinds of business and trade, to control, vary, or annul the general liabilities of parties under the common law, as well as the commercial law. It has long appeared to me that there is no small danger in admitting such loose and inconclusive usages and customs, often unknown to particular parties, and liable to great misunderstandings and misinterpretations and abuses, to outweigh the well-known and well-settled principles of law." Many similar remarks of eminent judges might be cited. But in the application of these general views it will be found difficult to ascertain what is considered a principle of law that cannot be interfered with. Principles of law differ in their importance as well as in their origin; and while some of them represent great rules of policy, and are beyond the reach of convention, others may be changed by parties who choose to contract upon a different footing; and some of them may be varied by usage, which, if general and long established, is equivalent to a contract. Thus in *Wigglesworth v. Dallison*, Doug. 201, which Mr. Smith has selected as a leading case, the law gave the crops of an outgoing tenant to his landlord; but the custom which made them the property of the tenant was held to be valid.

The rule of law invoked in this case is one of very limited application. The whale fishery is the only branch of industry of any importance in which it is likely to be much used; and if a usage is found to prevail generally in that business, it will not be open to the objection that it is likely to disturb the general understanding of mankind by the interposition of an arbitrary exception. Then the application of the rule of law itself is very difficult, and the necessity for greater precision is apparent. Suppose two or three boats from different ships make fast to a whale, how is it to be decided which was the first to kill it? Every judge who has dealt with this subject has felt the importance of upholding all reasonable usages of the fishermen, in

Swift v. Gifford.

order to prevent dangerous quarrels in the division of their spoils. In *Fennings v. Grenville*, 1 Taunt. 241, evidence was offered of a custom in the Southern fishery for the contending ships to divide the whale equally between them. This custom, which differed entirely from that prevailing in the North Atlantic, was yet thought to be not unreasonable. Chambre, J., said, "I remember the first case on the usage which was had before Lord Mansfield, who was clear that every person was bound by it, and who said, that were it not for such a custom there would be a sort of warfare perpetually subsisting between the adventurers." The case went off upon a question of pleading, and the custom was not passed upon, but it is clear that it was thought to be valid. In the other cases cited, the usage first above mentioned was found to be valid. In the case of *Bartlett v. Budd*, 1 Lowell, 223, the respondents claimed title to a whale by reason of having found it, though it had been not only killed, but carefully anchored, by the libellants. I there intimated a doubt of the reasonableness of a usage in favor of the larceny of a whale under such circumstances. And I still think that some parts of the asserted usage could hardly be maintained. If it were proved that one vessel had become fully possessed of a whale, and had afterwards lost or left it, with a reasonable hope of recovery, it would seem unreasonable that the finder should acquire the title merely because he is able to cut in the animal before it is reclaimed. And, on the other hand, it would be difficult to admit that the mere presence of an iron should be full evidence of property, no matter when or under what circumstances it may have been affixed. But the usage being divisible in its nature, it seems to me, that, so far as it relates to the conduct of the men of different vessels in actual pursuit of a whale, and prescribes that he who first strikes it so effectually that the iron remains fast should have the better right, the pursuit still continuing, it is reasonable, though merely conventional, and ought to be upheld. In *Bourne v. Ashley*, determined in June, 1863, but not printed, Judge Sprague, whose experience in this class of cases was very great, found the custom to be established, and decided the cause in favor of the libellants, because they owned the first iron, though the whale was killed by the crew of the other vessel,



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or by those of both together. Mr. Stetson, of counsel in that case, has kindly furnished me with a note of the opinion taken down by him at the time, and I have carefully compared it with the pleadings and depositions on file, and am satisfied that the precise point was in judgment. The learned judge is reported to have said that the usage for the first iron, whether attached to the boat or not, to hold the whale, was fully established, and that one witness carried it back to the year 1800. He added, that, although local usages of a particular port ought not to be allowed to set aside the general maritime law, this objection did not apply to a custom which embraced an entire business, and had been concurred in for a long time by every one engaged in that trade.

In this case the parties all understood the custom, and the libellants' master yielded the whale in conformity to it. If the pursuit of the Rainbow had been clearly understood in the beginning, no doubt the other vessel would not have taken the trouble to join in it, and the usage would have had its appropriate and beneficial effect. In the actual circumstances, it is a hard case for the libellants; but as they have not sustained their title, I must dismiss their cause, and, in consideration of the point being an old one in this court, with costs. *Libel dismissed, with costs.*

UNITED STATES v. M. S. P. LAWS.

APRIL, 1872.

In an indictment under sect. 12, Stat. July 1, 1864, 13 Stats. 307, against a clerk in the post-office for secreting and embezzling a letter containing a bank-note, which describes the letter according to its direction, which is to some one other than the defendant, it is not necessary to allege that the letter or the note was the property of any one.

If the letter was enclosed in an envelope, and the envelope was directed to A. B., the letter is well described as directed to A. B.

The indictment need not allege that the clerk obtained the letter by virtue of his employment: it is enough that, being a clerk, he has obtained possession of the letter.

It is not necessary to set out the places from and to which the letter was to be carried by post.

The indictment need not allege that the grand jury was duly organized, and that twelve concurred in the finding.

THE first count of this indictment charged that the defendant, on a certain day, at Boston, did secrete and embezzle a certain letter, then and there directed to Sarah E. Dalzell, in the words and letters following, "Mrs. Sarah E. Dalzell, Ellsworth, Maine," with which he was then and there intrusted, and which had come to his possession, and was then and there intended to be conveyed by post, containing a certain bank-note for the payment of two dollars, he, the said Laws, at the time, &c., being then and there employed in one of the departments of the post-office establishment, to wit, being a clerk, &c. The second count described the bank-note, and alleged that it was of the value of two dollars, and that the letter came into the possession of the defendant "so then and there employed as a clerk in the said post-office," and that the letter with the said article of value having so come into his possession, he did then and there secrete and embezzle the letter then and there containing the said article of value. At the trial, a verdict of guilty was found; and the defendant moved for a new trial, and in arrest of judgment.

G. Sennott, for the defendant. 1. It is not averred that the defendant obtained the letter "by virtue" of his employment. It is said, and repeated, that he was a clerk, and that being such clerk he secreted and embezzled the letter; but this is not enough: he must be shown to have broken the trust confided to him by the government.

2. The property in the letter and the bank-note ought to be set out. It may be that the address of the letter was fictitious, and intended to mean the defendant, and the money may have been his.

3. The letter is not described at all. It appears on inspection to be enclosed in an envelope, which is directed in the manner charged, but the letter is not directed.

4. The indictment should aver the due organization of the grand jury, and that twelve concurred in the finding.

E. P. Nettleton, assistant district attorney, cited *United States v. Mills*, 7 Pet. 138; *United States v. Nott*, 1 McLean, 499; *United States v. Martin*, 2 id. 256; *United States v. Lancaster*, id. 431; *United States v. Patterson*, 6 id. 466; *United States v.*

Clark, Crabbe, 584; *United States v. Okie*, 5 Blatch. 516; and on pleading generally in misdemeanors, *United States v. Gooding*, 12 Wheat. 460, 474.

LOWELL, J. Much more laxity of pleading has been permitted in setting out the offences created by acts of congress than obtained under the system of the common law, even when that system was applied to new statutes. The cases cited by the district attorney all agree that this offence may be charged substantially in the words of the statute. Were it not for these authorities, there would seem to be much force in the objection that the property in the bank-bill should be laid in some one other than the defendant. Such is the usual rule in embezzlement as well as larceny. And if the indictment were for stealing the money from the letter, it may be that the analogy would hold good. Such appears to be the opinion of Mr. Justice Curtis, as indicated by the marginal note to the case of *United States v. Foye*, 1 Curtis, C. C. 364, though the judgment is silent on this point. And the supposed decision in that case, which had not then been reported, appears to have been followed in *Cummings' Case*, 3 Pittsb. Leg. Jour. 405. But where the charge is, that a clerk secreted and embezzled a letter, which is described as having been addressed to some one else, and was intended to be conveyed by post, the gist of the offence is in the breach of trust as applied to the letter, and it has not been usual to lay the property in the letter in any one. Two of the cases cited at the bar decide this point. There is no real hardship in this decision, because the property might be laid in the United States as bailees, and then precisely the same evidence would be sufficient for a conviction as would be received under the counts of this indictment, and the defendant would still be left to rebut the presumption arising from the fact of his dealing with a letter which did not appear to be his.

It was argued that the envelope is no part of the letter, and that, therefore, there is a variance. This was duly reserved at the trial, and comes up regularly on the motion. So far as the argument rested on the assumed fact, concerning which there was no evidence on either side, that the use of envelopes was unknown, or was rare, when the post-office act of

1825 was passed, both parties appear to have been under the impression that this indictment must be founded on that statute. Undoubtedly it was so intended. But sect. 21 of that act has been repealed or remodelled by the statute of July 1, 1864, 13 Stats. 337, which copies the section in many parts with great exactness, but adds to the list of securities that may be secreted or embezzled many that have come into use since 1825, such as stamps of various kinds, and adapts the law in other respects to the changes in the service. It is by this statute that the indictment must be tried, whatever may have been the intent of the pleader who drew it; and it is not contended that in 1865 envelopes were not in common use and popularly considered a part of the letters which they enclosed. The other answer of the district attorney appears to be equally strong, that when a letter is in fact put in an envelope which is directed to a certain person, the letter is directed to that person whether the envelope forms part of the letter or not.

Another very ingenious point much dwelt on by counsel is, that the charge does not contain the technical and precise averment, that the defendant came into possession of these letters by virtue of his employment. Possibly the indictment is open to this criticism; but, if so, the statute is equally deficient. The law appears to avoid with care this limitation. The language, both in the act of 1825 and in that of 1864, is, which shall have been intrusted to him, "or which shall have come to his possession," intending, no doubt, to punish all such acts committed by persons employed in the department, whether the letters were regularly in their possession or not. For instance, if a clerk takes the letters from some box or bag in charge of another clerk, or any with which he has no concern whatever, he is within the statute. If there is any implied limitation in the statute, such as of a letter picked up in the street, it may equally be left to implication in the indictment, and would be excluded by not conforming to the allegation that it was intended to be conveyed by post.

The objection that the places between which the letter was intended to be conveyed are not set out, was fully considered by Judge Benedict in the case of *United States v. Okie*, 5 Blatch.

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C. C. 516, and in that decision, overruling the objection, and in the reasons given for it, I concur.

Indictments never allege the organization and action of the grand jury further than is done in this case. The signature of the foreman vouches for the regularity of the proceedings after the jury are impanelled, and the records of the court show the *venire*, &c.

Motions denied.

Re THE WRENTHAM MANUFACTURING COMPANY. — Ex parte SOUTHWICK.

APRIL, 1872.

The treasurer of a manufacturing company, who signs and indorses promissory notes for the company in the usual course of business, does not by such usage acquire, nor is he held out as having, the right to sign or indorse notes, for the accommodation of third persons.

A receipt, not negotiable, and intended as a memorandum of indebtedness by the maker thereof to the holder, does not come within the rule of law in Massachusetts, that one who indorses a note, not being a holder of it, is an original promisor. Whether the indorsement of such a receipt by a third person creates any contract between him and the holder, *quære*?

Where a firm gave such a receipt to A., and at his request one of the firm, who was treasurer of a manufacturing company, indorsed the paper in the name of that company, without any consideration moving to the company, — *Held*, the amount was not provable against the estate of the manufacturing company in bankruptcy.

ROYAL SOUTHWICK offered for proof, against the estate of the Wrentham Manufacturing Company in bankruptcy, a certain instrument, of which this is a copy: —

\$2,000.

BOSTON, Jan. 21, 1870.

Received of Royal Southwick, two thousand dollars, on account. Loan.

J. H. JONES, JR., & Co.

(Indorsed.)

Waiving demand and notice.

WRENTHAM MANUFACTURING CO.,

J. H. JONES, JR., *Treas.*

The evidence tended to show that Jones was the treasurer of the company, and had been accustomed to sign and indorse notes for the corporation, in the course of the business, though

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not for the accommodation of third persons; that the \$2,000 was borrowed by Mr. Jones, for the use of his firm, and that the petitioner asked him if he could not give him the name of the Wrentham Company, and upon this request the indorsement was made. The firm were, at the time this money was borrowed, indebted to the manufacturing company.

A. Hemmenway, for the petitioner. By the law of Massachusetts, one who indorses a note before its delivery, not being the payee, is an original promisor. Jones had authority to sign notes for the bankrupts, and his signature binds them.

B. F. Bowles, for the assignees. The evidence shows that the promise of the corporation, if it be one, was given for the accommodation of Jones & Co., and that the petitioner so understood it. The power to sign notes in the ordinary course of business will not extend to such a signature, excepting when third persons have been misled.

LOWELL, J. The doctrine is firmly established in Massachusetts, that an indorsement of this sort, made by one who is not the payee of a note, and made before the note is negotiated, binds the indorser as an original promisor. The cases are reviewed in *Union Bank v. Willis*, 8 Met. 504; and the court, while regretting that the law had been so settled, yet were unwilling to change it, after so many decisions had fixed it. Most of the cases are of negotiable notes; but I do not see why the rule is not equally applicable to notes which are not negotiable, because it is on the very ground that the signature on the back of a note, by one who is not payee or indorsee, is not a strict indorsement, that they give it effect as a promise. But I am not aware that any case has gone so far as the petitioner desires me to go in this case. The contract given in evidence is not a note, but a receipt, and is hardly to be understood without explanation. It might mean that Southwick was paying money to Jones & Co., which he already owed them, and taking their receipt on account of that loan. When it is proved that he did not owe them, the receipt can be understood as a memorandum, which would be evidence of money had and received by them of him, and the promise to repay it is implied by law. Now, if such a memorandum is signed by two persons, it is evidence that they

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have both received the money, and they may be *prima facie* liable to repay it jointly, or jointly and severally; but that an indorsement of such a receipt, waiving demand and notice, means that the indorser undertakes to pay as a promisor what the other party is impliedly bound to pay as having received the money, seems to be stretching the language of the parties beyond reason. Perhaps it was the intent of the parties that the manufacturing company should be either a surety or a guarantor; but they do not appear to me to have expressed any such legal intent by the indorsement of this receipt. A receipt is not intended for currency: it does not pass by delivery, nor by indorsement, but is merely a memorandum between the parties; and the indorsement of such a paper is a mere *nudum pactum*, or mere evidence of a right by the indorsee to sue in the name of the indorser.

Granting, however, that the analogy of the law of notes held good, the Wrentham Company would be only sureties for the accommodation of the principal debtors; and though this would be no defence for an individual who lent his name, because the very purpose of his act was to give credit to the principal, nor to a trading corporation against a purchaser of negotiable paper before due without notice, yet when we come to a contract of this kind, the lender had no right to assume that the agent had authority to pledge the credit of the corporation. There was no by-law nor practice to sanction this proceeding; and the petitioner seems to have understood, and the form of the paper tends to prove that he must have understood, that the name of the manufacturing company was given only for the accommodation of Jones & Co. For these reasons, the proof must be limited to the undisputed note for \$1,690 and interest, rejecting the other.

Order accordingly.

Re Fowler.

Re J. L. FOWLER.

MAY, 1872

Any creditor who has a provable debt against a bankrupt may apply to the court, after a year, and perhaps earlier, to require the bankrupt to have the question of his discharge determined.

If a bankrupt has applied for his discharge, and given due notice, &c., but has neglected to procure an order granting the discharge, it is not usually permitted to a creditor, who neglected to file objections in due time, to come in and file charges in opposition. The rights of all parties have already been fixed, and the mere neglect to take out an order ought not to prejudice the bankrupt.

If, in such a case, a creditor discovers frauds, he may require the bankrupt to take his discharge, if he chooses to do so, and the creditor will then have his remedy by applying to annul it.

The two years within which a creditor may have discharge set aside begins when the debtor actually takes his discharge; but the previous knowledge which is to bar the creditor's right to annul, must be knowledge which he could have availed of, that is, such as he had before the return-day of the order, to show cause why the discharge should not be granted.

BANKRUPTCY. — This bankrupt applied for his discharge in May, 1868, which was within one year after the proceedings were begun; and on the return-day in the following month a creditor filed specifications of objection; and nothing more appeared of record until March, 1872, when a different creditor applied for an order on the bankrupt to show cause why he should not bring the proceedings to a close, and for permission to oppose the discharge, on the ground that the first objecting creditor had been settled with, in order to avoid his opposition. This applicant had not proved his debt, and had not opposed the discharge, and said he had discovered the facts only a few months before he made his application.

F. Woodside, for the creditor.

A. Wellington, for the bankrupt.

LOWELL, J. It appears that the plaintiff, so to call him, has a provable debt, for which an action is pending in a State court. Under sect. 26 of the bankrupt act, which requires all such suits to await the determination of the question of discharge, provided there be no unreasonable delay on the part of the bankrupt in endeavoring to obtain it, it is my practice to permit any creditor,

Re Fowler.

whether he has proved his debt or not, to apply for such an order as was granted in this case, to show cause why he should not receive his discharge, or be refused it. If this were not allowed, every State court, where any suit was pending against the bankrupt, would be obliged to inquire whether any delays that might have occurred in this court were due to the bankrupt's fault; an issue which might often be not only very embarrassing to the State court, but might lead to misunderstandings and counter orders in the different jurisdictions. When, therefore, any creditor demands it, after the lapse of the year allowed by statute, and perhaps in some cases before that time, I proceed to require the bankrupt to bring forward the case, or be refused his discharge.

I am not prepared to grant the second part of the application, and hear objections from a creditor who has neglected for so many years to take any steps in the cause. Supposing it to be true that the bankrupt has dealt unlawfully with the original objecting creditor, and has influenced his action by a pecuniary consideration, contrary to sect. 29, yet this is alleged to have been done long ago, and the present applicant, when he discovered the fact, did so with no view to the proceedings here. He was merely looking up the evidence here, in order to see what his rights were at common law. It seems to be in violation of sound practice to let him in to oppose the discharge at this time. All that a creditor in that situation can do is to speed the cause on the record as it stands.

I have known the argument to be advanced that a creditor should be heard against the discharge, at any time before it is actually taken out; because, if he discovers any fraud before that time, he cannot obtain a rescission of the discharge under sect. 34. But my opinion is that sect. 34 must be construed to mean, that if within two years after the actual date of the discharge, or of the order for it, a creditor applies to annul it, and proves a fraud such as is referred to in that section, and proves that he did not know of the fraud on the return-day of the order to show cause, on the bankrupt's application for his discharge, he is entitled to have it set aside. My reason is, that the return-day is the last day on which a creditor has a right to appear. It cannot

Re Ruddell.

be that he is to be barred of his petition to annul, by a knowledge which was too late to be of any use to him, nor that he is bound to apply to the court for an enlargement of time, in every case in which the discharge happens not to have been issued or granted as soon as the bankrupt was entitled to have it. By intendment of law, the rights of the debtor and his creditors are ascertained on the return-day. But the debtor cannot defeat the operation of the thirty-fourth section by neglecting for two years to procure an order of discharge. It follows, as a reasonable construction of the whole section, according to its true intent, that different points of time must be considered as referred to by the two phrases, in themselves very much alike, concerning the time for applying to annul, and the time after which the creditor must have acquired his knowledge, else the discovery of a fraud during the interval, long or short, after the bankrupt's right to his discharge is fixed, and before it is actually granted, will be a *casus omissus*. The protection which the court has, in this precise case now before me, is that the bankrupt must make oath that he has not influenced any creditor.

Discharge to be granted, if the bankrupt files the usual certificate and oath within fourteen days ; without prejudice to the right of this creditor to apply under sect. 34.

Re JANE RUDELL.

MAY, 1872.

A married woman who comes to this State without her husband, he never having lived with her in this State, has full power to contract as if she were sole. Sect. 29 of Gen. Sts. ch. 108, does not restrict or limit the power of such married women to contract within the bounds which the earlier sections of that chapter fix for women married and living with their husbands in this State. Therefore, where such a married woman as first above mentioned contracted a debt as guarantor, and for the accommodation of a friend, the debt having no connection with her separate estate or with her trade, and became bankrupt, the debt was admitted to proof against her assets.

BANKRUPTCY. — Application by a creditor, whose debt had been duly proved, to expunge the proof made by George W.

Re Ruddell.

Chipman & Co., upon certain promissory notes indorsed by the bankrupt, and upon an account guaranteed by her. The allegations were, that the bankrupt was a married woman, and that the debts in question were contracted for the accommodation of her son-in-law. This was admitted; but it was further alleged and proved, in support of the claim, that the bankrupt was a native of Great Britain, was married there, and was forced to leave her husband, by his neglect and inability to support her; that she had come to Boston without her husband several years ago, and had never cohabited with him here, nor been supported by him since her arrival, but had traded in her own name and on her own account.

E. Avery & C. S. Lincoln, for the motion to expunge. The statute which permits married women to hold separate estate, and to trade and contract debts, does not make valid all contracts into which they may choose to enter, but only such as relate to their trade, or to their separate estate. Such a woman cannot enter into partnership with her husband, nor contract with him at law, nor bind her separate estate by an ordinary contract which does not relate to that estate, or does not pledge it explicitly; nor can she bind herself for the accommodation or as the surety of her husband or any other person: *Willard v. Eastham*, 15 Gray, 328; *Harrington v. Thompson*, 9 id. 65; *Burns v. Lynde*, 6 Allen, 305; *Plumer v. Lord*, 7 id. 481; Gen. Sts. of Mass. ch. 108.

R. Lund, for the proving creditors. Our rights do not depend upon the law of 1855, but upon the Revised Statutes of 1836, ch. 77, § 18, which, in the General Statutes, is found in sect. 29 of the chapter cited by the petitioner, and which gives full power to married women coming into this State without their husbands to contract as if they were sole. This is only a slight modification of the common law of Massachusetts, by which such women were held to have full power of contracting, if their husbands had deserted them, or obliged them to leave their home: *Gregory v. Paul*, 15 Mass. 31; *Abbot v. Bayley*, 6 Pick. 89.

Mr. Avery, in reply. We admit that the bankrupt had power to contract for many purposes, but not for the accommodation of a third person. The common-law rule, applicable to women

whose husbands had abjured the realm, did not extend beyond the reason for it, that is, to contracts for the support of the wife and her family ; and the statute should be limited in the same way.

LOWELL, J. The cases cited at the bar seem to me to establish the doctrine for which they were introduced, that, by the common law of Massachusetts, a married woman in the situation of this bankrupt might contract as if she were sole. I do not find in them any restriction, such as is suggested, to contracts for necessities. Then comes the statute of 1836, which is as broad as it could well be. "She may make contracts, and commence, prosecute, and defend suits in her own name, and dispose of her property which may be found here, in like manner, in all respects, as if she were unmarried." No doubt there is in this clause an implied exception of marriage contracts ; but, even as to these, it may be that an action might be maintained for a breach by a man with whom the woman should have contracted as if sole. There is certainly no express exception ; and if an unmarried woman can indorse notes or guaranty accounts, this bankrupt might do it, unless the General Statutes, in codifying the law, have changed it. Sect. 29 of ch. 108 begins by giving to every married woman who comes into this State without her husband all the powers given to married women in the preceding sections ; and this clause must, of course, be governed by the decisions applicable to those sections which define and limit the powers of such persons ; but the section then proceeds to add all the provisions of sect. 18 of the former act, "and may also transact business, make contracts, and commence, prosecute, and defend suits in her own name, and dispose of her property which may be found here, as if she were unmarried."

It was not the intent of this section to restrict the powers which women already had, but rather to enlarge them. The reason for enacting the first clause undoubtedly was to give, in addition to the general powers to contract and to sue, whatever other privileges women married in this State are granted by the earlier part of the chapter, such as the right to take separate property by descent, &c., and, perhaps, to dispose of their own personal property, though it might not happen to be found here. There are several such rights and powers which might not be considered

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as definitively granted by a privilege to contract and to dispose of property found here. It follows that Mrs. Ruddell had power to make these contracts, though they were founded upon a consideration which concerned neither her separate property nor her trade ; and that they can be proved in bankruptcy.

Proof to stand.

Re JAMES MCGLYNN.

MAY, 1872.

A bankrupt has a standing in court to object to the confirmation of assignees of his estate.

It is not illegal to hold a court of the United States on a day appointed by the president of the United States, and by the governor of the Commonwealth, as a day of thanksgiving.

Where a register in bankruptcy held a first meeting of creditors on Thanksgiving Day, and no creditor was shown to have been injured thereby, and no one opposed the appointment of the assignee then chosen and qualified, except the bankrupt, and he had neglected to return the warrant to the register for a change of day, which the register had offered to make, the court refused to set aside the proceedings.

BANKRUPTCY. — Petition by the bankrupt to set aside the appointment of assignees, because the first meeting of creditors was held on the day appointed by the governor of Massachusetts, and recommended by the president of the United States, as a day of general thanksgiving, alleging that seventeen creditors were named in the schedules, to whom were owed \$3,451, and that only six of the creditors attended the meeting, and the aggregate of debts proved was \$2,154.13 ; that the register was notified before the meeting was held that it had been called for a holiday ; and that some creditors failed to attend by reason of the choice of this day.

The answer of the assignees admitted that the meeting was held on Thanksgiving Day, but denied that any creditor had failed to attend on that account ; and averred that the bankrupt had been notified by the register in due season before the meeting, that, if he would return the warrant for correction, a new appointment should be made ; but the bankrupt neglected so to do.

At the hearing, there was no evidence that any creditor was

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dissatisfied with the proceedings, or had failed to attend the meeting by reason of its being held on Thanksgiving Day.

S. Thomson, for the bankrupt.

R. M. Morse, Jr., for the assignees.

LOWELL, J. It was made a question in argument whether the bankrupt has a standing in court to make this application. I think he has. It is in the power of hostile assignees to oppress and embarrass the bankrupt; and, while the courts have very properly held that persons intimate and friendly with him might be objectionable on that very account, it has not been denied that the confirmation of assignees who are unreasonably hostile might be opposed by the bankrupt himself. He is bound, by the statute, under a severe penalty, to give notice of any false debt that may be offered for proof; he is, besides, personally interested to see that no false debt is proved, because the creditors have a voice in his discharge; he is interested in the assets in the not unprecedented event of a surplus. His connection with the settlement of his estate is so close that he may object to the appointment of an assignee whom he finds unfit, or to have been irregularly chosen.

The petitioner has not proved that the assignees are unfit or incompetent persons, nor that any creditor wishes a change, nor that any one was prevented from attending the meeting. There is nothing which addresses itself to the discretion of the court under sect. 18 to order a new election. The illegality of the meeting is the only point now insisted on. That question appears to be settled by the case of *The Tangier*, 23 How. 28, s. c. 1 Clifford, 396, in which it was decided that the fast-day appointed in Massachusetts was not a *dies non* for merchants and ship-owners. I understand that case to decide that a mere holiday, whether established by usage or by statute, is not binding on persons who do not choose to observe it, unless work is actually prohibited by law, as it is on Sundays. I have not found any act of congress, or of the legislature of the State, which makes work illegal or punishable on Thanksgiving Day. The courts of Massachusetts are not to be held on that day, except for the purpose of entering or continuing cases, instructing or discharging a jury, receiving a verdict, or adjourning: Gen. Sts. ch. 122, § 4. This prohibition does not extend, and could not extend, to the courts of the United States, as such, though, by comity, it would be likely to

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govern the practice of those courts, as it always has governed mine. So the President's proclamation appears to be rather a recommendation than an order. The bankrupt act, § 48, excludes Sunday, Christmas Day, the Fourth of July, and any day appointed by the President as a day of public thanksgiving, from the computation of time within which any act shall be done under that law, but does not of itself make the holding of court on those days illegal. I conclude, from this review of the law, that there was no positive irregularity in the meeting. The appointment was made by mistake, and the fact was first made known to the register by the bankrupt's attorney, after he had issued his warrant and given it to the bankrupt for service; and the register thereupon offered to change the day, if the warrant should be returned to him for that purpose. This was not done; and the only person who now objects to the proceedings is the bankrupt, who is responsible for them. Acquiescence would not make them valid, if they were void; but, as the question becomes one of discretion, and I find no creditor objecting, no person asking for an adjournment at the time, no imputation made in evidence upon the fitness of the assignees, and it seems probable that this application is intended merely to operate in avoidance of a suit which the assignees have brought against the bankrupt and his wife to set aside a conveyance which is alleged to be fraudulent, in which suit I have heretofore refused to inquire, collaterally, into the regularity of the first meeting of creditors. Under these peculiar circumstances, I do not think I ought to set aside the choice. *Petition dismissed.*

Re JOHNSON & STOWERS.

MAY, 1872.

The conveyance of the joint assets of an insolvent firm to a continuing partner is a fraudulent preference by the bankrupt act; if made within four months of a petition in bankruptcy, it may be set aside by the joint creditors.

Whether joint creditors can share equally with separate creditors in the separate property of the continuing partner, if there is no joint estate and no solvent partner, *quære.*

It seems that joint creditors may assent, after petition in bankruptcy, to such conveyance, and come in with separate creditors to prove their debts against the separate estate of the continuing partner, if he has assumed the joint debts.

JOHNSON & STOWERS were copartners in the trade of retail grocers, and dissolved their firm Nov. 4, 1870. Stowers intended to continue the business with new partners; and he paid Johnson \$5,000 for his interest, and gave him a bond to pay the joint debts, and Johnson gave Stowers a conveyance of all the joint estate. A few days afterwards Stowers discovered that the firm was insolvent, and tried to make a settlement with the creditors; failing in which he brought a petition in this court Dec. 2, 1870, to have the firm adjudged bankrupt, alleging fraud on the part of Johnson in the contract of dissolution. A trial was had; and the firm were adjudged bankrupt, on the ground of insolvency, without a determination of the question of fraud. *Re Stowers*, 1 Lowell, 528.

The assignees collected \$3,821.07 from the assets, which had been conveyed by Johnson to Stowers; and on the presentation of his account a separate creditor objected that this money should have been returned as the separate property of Stowers, instead of being credited to the joint account. Both partners were liable, individually, to this creditor, and neither had any separate estate, unless the joint assets had become separate by the contract of dissolution, and its consequences. Evidence was taken before the register, and reported by him; and he expressed the opinion that the arrangement between the partners was rendered voidable by the fraud of Johnson, and that the assets should be treated as the joint property of the firm.

S. A. Bolster, for the separate creditor.

C. P. Hinds, for the joint creditors.

LOWELL, J. That partners may dissolve their connection, and, as part of the arrangement, may convey all the assets to one of them, and may thus lawfully convert joint into separate estate, has become an established doctrine in equity as well as at law: *Ex parte Ruffin*, 6 Ves. 119; *Ex parte Fell*, 10 id. 347; *Howe v. Lawrence*, 9 Cush. 553; *Robb v. Mudge*, 14 Gray, 534; *Ex parte Williams*, 11 Ves. 3. The rule, and the reason for it, are thus stated in Story on Partnership, § 358: "While the partnership is solvent and going on, the creditors have no equity, strictly speaking, against the effects of the partnership. All they can or may do is to proceed by action at law for their debts against the

partners ; and, having obtained judgment therein, they may cause the execution issued on that judgment to be levied upon the partnership effects, or upon the separate effects of each partner, or upon both. There being, then, no lien and no equity in favor of the creditors against the partnership effects until such execution is issued and levied thereon, it follows that these effects are susceptible of being legally transferred *bona fide*, for a valuable consideration, to any persons whatsoever, and as well to the other partners as to mere strangers." The injustice of this doctrine, when applied to a settlement in bankruptcy in which the courts recognize the assets as severed, but refuse to sever the debts, has struck many learned judges. Thus, Sir J. Leach, V. C., in *Ex parte Freeman*, Buck, 474: "I agree that it may be some hardship upon the joint creditors that the joint stock, to which they have specially given credit, should, by the dealing of their debtors with each other, be thus converted into separate estate. That hardship would have been avoided, if it could have been held that where, upon a dissolution, one of two partners is to become the sole owner of the joint stock, and it is a part of the consideration that he shall pay the joint debts, such joint stock shall not, in bankruptcy, be considered as converted into separate estate, unless he has paid the joint debts. The cases of *Ex parte Ruffin*, and the others which have followed it, have established that the legal principle which converts the joint estate into the separate estate, by the mere force of the contract, is too strong for this equity."

Several of the cases present strong illustrations of this hardship. In *Howe v. Lawrence*, 9 Cush. 553, the firm had been dissolved but a few weeks before the bankruptcy, and but few new debts had been contracted, and there was newly acquired property to represent them.

The rule can never satisfy the courts or the suitors, and it has been made subject to several exceptions in England, which are of very doubtful application, to say the least, in this country. One of them is involved in this case ; namely, that if there is absolutely no joint estate and no solvent partner, that is, no partner out of bankruptcy, the joint creditors may come in against the separate estates of the partners in competition with the sepa-

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rate creditors. This exception is called "an eccentric variation," by Daniel, J., delivering the judgment of the supreme court in *Murrill v. Neill*, 8 How. 426, and at pp. 427, 428, the learned judge expresses great doubt of its soundness, and of its having been adopted in this country. He cites *McCulloh v. Dashiell*, 1 Harris & Gill, 96, as expressly repudiating it. It has been doubted or positively denied by several other courts in America. See *Re Marwick*, Daveis, 229 (2 Ware, 233); *Howe v. Lawrence*, 9 Cush. 553; *Somerset Pottery Works v. Minot*, 10 id. 592; *Weyer v. Thornburgh*, 15 Ind. 124; *In re Byrne*, 1 N. B. R. 464. There are others which uphold it, and I have carefully read them; but I do not see in them a very full and careful consideration of the authorities, and reasons which have been brought to bear against it. I find it difficult to say that the clear and decisive command of the bankrupt act, § 36, requiring the joint estate to be appropriated to pay the creditors of the copartnership, and the separate estate of each partner to pay his separate creditors, is dependent for its operation upon the accident that the joint fund has already been exhausted before the bankruptcy, in paying the joint debts, or in any other lawful way. Mr. Justice Bigelow, speaking of the statute of Massachusetts which congress has adopted, *totidem verbis*, says, that it is distinct and peremptory, and recognizes no such exception: *Howe v. Lawrence*, *ubi supra*.

The better mode of meeting the difficulty seems to me to be to permit the joint creditors to assent to the conversion, and thus to become separate creditors, even after bankruptcy has occurred. The decisions have been tending to this point, though but few have yet reached it. The early cases laid down the rigid rule, that there could be no substitution or conversion by which a joint debt of two partners should become the separate debt of the remaining partner; because there was no consideration for the relinquishment of the responsibility of the retiring partner: *Lodge v. Dicus*, 3 B. & Ald. 611; *David v. Ellice*, 5 B. & C. 196. This strict construction, under the guise of protection to the rights of the creditor, really destroyed them, in many cases; and it is now well settled, in England, that if the creditor has assented to the change, whether expressly or by a course of dealing, the debt is severed: *Thompson v. Percival*, 5 B. & Ad. 925; *Oakley v.*

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Pasheller, 4 Clark & F. 207; *Hart v. Alexander*, 2 M. & W. 484; *Lyth v. Ault*, 7 Exch. 669; 1 Lindley, Partn. (2d ed.) 454. In bankruptcy, it is always permitted to a creditor who has assented to the arrangement to prove against the estate of the substituted debtor: Collyer, Partn. (5th Am. ed.) § 918; Robson, Bankruptcy, p. 508.

The law in this country is not entirely uniform, but the better opinion seems to be in accordance with the later decisions in England: Story, Partn. (6th ed.) § 155, 156; Parsons, Partn. 421; *Waydell v. Luer*, 3 Denio, 410; *Backus v. Fobes*, 20 N. Y. 204; *Shaw v. McGregory*, 105 Mass. 96; *Harris v. Lindsay*, 4 Wash. C. C. 271. In *Wild v. Dean*, 3 Allen, 579, decided in 1863, it was held that, even in bankruptcy, to enable a creditor to share in the continuing partner's estate it was not enough that the continuing partner had become bound to the retiring partner to assume all the debts, and that the creditor had assented, but there must be a new promise to pay each creditor in particular. This decision does not seem to accord with the recent authorities above cited; and the law of Massachusetts was very soon changed by Stat. 1865, ch. 113, which gives the creditor his election, and permits him to exercise it even after the debtor has become a statute bankrupt. This appears to be a reasonable rule, as I have before said. The courts have thought the choice should be made before actual bankruptcy; because that act is supposed to fix the rights of all parties, and under all circumstances, beyond any possible modification. In this I find the courts have been too rigid, because bankruptcy often follows very close on the change of the firm, and before the creditors have had an opportunity to elect; and there is really no reason why they should not elect by offering to prove their debt, as well as in any other way. It is the bankrupt who loses the power of action, and not his creditors, by his filing a petition in bankruptcy. There is no possible equity against this rule; because any new creditors whom the continuing partner may have dealt with, may well enough be put to inquire the terms on which the old firm was dissolved; and they, in fact, would usually know it. The doctrine which severed the assets and refused to sever the debts, not only did an injustice to

the joint creditors, but often gave an altogether unexpected and unjust advantage to separate creditors; for it, of necessity, let in against the assets all the separate creditors, though their debts may have been contracted during the continuance of the firm.

I come now to a consideration which appears to me not to have received its due weight in some of the discussions of this subject. It has been held by highly respectable authority, and is the law of New Hampshire, and perhaps of some other States, that the creditors themselves have an equity, independently of the partners, to require the assets to be marshalled at least when the firm is actually insolvent: *Ferson v. Munroe*, 1 Foster (21 N. H.), 462; *Jarvis v. Brooks*, 7 id. 37; *Benson v. Ela*, 4 Fogg (35 N. H.), 482; *Jackson v. Cornell*, 1 Sandf. Ch. 348; *Burtus v. Tisdall*, 4 Barb. 571. But the better opinion appears to be, that, there being no such thing as a preference known to common law or to equity, there is no way, in the absence of a bankrupt law, of reaching any result which will make the marshalling compulsory, excepting by attachment, or through the intervention of a court of equity; and that until suit brought the partners may honestly dispose of their property as they please, though it be to pay all their joint property to a separate creditor, or *vice versa*. I do not see how this conclusion can be escaped in the absence of a bankrupt law. Indeed, it is involved, together with much more, in the decision of *Ex parte Ruffin*, and all the cases which have followed it. See an able and learned discussion of the subject in the notes to *Silk v. Prime*, 2 Lead. Cas. in Equity (3d Am. ed.) 329, &c. But the point to which I now refer is this: When the bankrupt act lays down a positive rule of distribution for the joint and separate assets, and creates a fraud before unknown, called a preference, it is obvious that partners who owe debts of both kinds may commit that fraud by conveying their joint property to a separate creditor, or even by dissolving their firm and dividing their property, and thus working out a preference to all their separate creditors. In an early case under this bankrupt law, I held that such an act was in itself fraudulent, if it would bring about this illegal result, and was so intended: *Re Waite*, 1 Lowell, 207; and see *Collins v. Hood*, 4 McLean, 186; *Ex parte Shouse*, Crabbe, 482; *Re Byrne*, 1 N. B. R. 464; *Phillips v. Ames*, 5 Allen, 183. Upon these

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authorities, and taking into view our doctrine of preference, so different from that adopted in England, we may say that the creditors, whether joint or several, have a right, by statute, to set aside any conversion of one class of assets into the other, if it be done by partners who are insolvent, with intent to give a preference, provided bankruptcy occurs within four months. In this case, the joint creditors might have declared upon this conveyance by Johnson to Stowers as a preference ; for the firm was actually insolvent, and the necessary effect of the conversion would be, if they became bankrupt, to give the separate creditors of Stowers a preference. I am aware of the strong reasons for not interfering with the rights of partners to dissolve their firm. It is not precisely that point which I am dealing with : insolvent partners have full liberty to dissolve ; but if they directly or indirectly make preferences, their acts, so far as they affect creditors, can be avoided within four months. This very brief period of limitation is their safeguard. In this case, the continuing partner petitioned, within four months, in the interest of the joint creditors ; and, as it turns out that the firm was actually insolvent when they dissolved, the conversion of the joint assets necessarily involved a preference, and the intent may be presumed. Both partners being in bankruptcy, there is no one against whom an action can be brought, and the point comes up for decision properly enough on the assignees' account.

It is to be regretted that the evidence is not so full as it might, perhaps, have been on the question of fraud. If Johnson committed a fraud in fact upon Stowers, the result is the same ; because it is only an honest conveyance, and one that both the partners are bound by, that would bind the creditors : *Ex parte Rowlandson*, 1 Rose, 89. It was on this ground that the register based his opinion, and it is a sound one in law ; but I have thought the fact somewhat doubtful, and have therefore gone beyond that consideration.

Both classes of creditors are to share alike.

THE MAGNA CHARTA.

JUNE, 1872.

The rights of seamen in respect to wages depend on the law of the flag, without regard to the nationality of the seamen themselves.

It appears to be the law of Great Britain, that when a seaman is hurt in the service of the ship, and left behind for that cause in a foreign port, and the cause is duly certified by the consul, the ship is responsible for his care and subsistence, but the wages stop.

Where such a seaman was so left behind, and the ship afterwards, on the same voyage, came back to the port and took the seaman on board again, and he served to the port of final discharge, and no new contract in writing was made with him, — *Held*, the presumption was that he was to have the rate of wages originally agreed on, though the market rate was lower at the foreign port.

But it would not be presumed that the seaman was to have wages for the whole voyage, including the time he was away from the ship.

So far as the wages only are concerned, it seems to be immaterial by the British law whether a seaman necessarily left behind at a foreign port for injuries received on board, was hurt in the service of the ship, or by his own fault. In either case the wages stop.

WAGES. — The libellant was shipped at New York for a voyage thence to Cette, in France, thence to Russia, and back to a port of discharge in the United States or British Provinces, term not to exceed twelve months, at twenty-five dollars a month, and received a month's advance. The vessel was registered as British, and the legal title was in a person living in Halifax, Nova Scotia, and the form of the articles was such as is required for such vessels. The voyage began 29th March, 1871; the vessel reached Cette in about thirty-five days, and lay there until 26th June, 1871. On the last-mentioned day, while the bark was still in port, the libellant fell from the cross-trees of the mizzen-mast while performing ship's duty, and was seriously hurt. He was sent to the hospital, where he remained for about seven months, and was wholly cured. The bark returned to Cette in January, 1872, and the libellant was taken on board again by the master, and served until the voyage ended at Boston, 28th May, 1872. The master tendered \$71.50 in full for wages due the libellant, which he refused.

Two certificates of the British consul at Cette were indorsed

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on the shipping articles: one, dated 26th June, 1871, that the seaman was left behind for sickness, not being able to go with the ship, and that the master had deposited certain sums for his wages and for hospital expenses; the second, under date 29th January, 1872, recited that the master refused to pay the remainder of the expenses, which was considerable. The answer of the master alleged that the seaman was drunk and unfit for duty, and was forbidden to go aloft, but insisted, and was injured by his own negligence; and that the reshipment at Cette was for fifteen dollars a month, a less rate of wages than the original hiring. There was conflicting evidence on both these points. Whether the ship was equitably owned by American citizens was likewise disputed.

C. G. Thomas, for the libellant, contended that the libellant was to have full wages for the whole time of the voyage.

J. Nickerson, for the claimant.

LOWELL, J. If American citizens transfer the legal title of their ship to a subject of Great Britain, and she is sailed under a British register, and the shipping articles conform to the change, I know of no law that authorizes me to apply our statutes to such a contract. The law of the flag must control in all such matters. In this case, indeed, there is no sufficient evidence that either the libellant or any owner of the vessel is one of our citizens; and the contract is clearly and wholly British. I must apply, therefore, as well as I may, the foreign law, which governs the rights of these parties: see *The Pawashick*, *infra*, 142.

It seems to me that the Merchant Shipping Act of 1854, §§ 185, 207, 209, have materially changed the maritime rule that seamen are not only to be cured at the expense of the ship, but to be paid wages until the end of the voyage. The first of these sections enacts that where the service of any seaman terminates before the period contemplated in the agreement, "by reason of his being left on shore at any place abroad, under a certificate of his unfitness or inability to proceed on the voyage, granted as hereinafter mentioned, such seaman shall be entitled to wages for the time of service prior to such termination as aforesaid, but not for any further period." What the certificate

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is appears by sect. 207, which makes it a misdemeanor for any master to leave behind any seaman, without obtaining the certificate of a consular officer, in writing, indorsed on the agreement, stating the fact, and the cause thereof; sect. 228 makes the owners responsible for the expenses and subsistence of a seaman, who receives any hurt or injury in the service of the ship, but does not say any thing about continuing his wages if he is obliged to leave the ship; and sect. 229 speaks of expenses in respect of the illness, injury, or hurt of any seaman whose wages are not accounted for to the consular officer, as before provided.

As I understand this law, the ship is liable for the expenses and subsistence of seamen who are hurt, but not for their wages, if they are left behind. All the parties to this controversy and the consul appear to have understood the law in this way. The master left with the consul the wages and a certain sum for expenses, and the consul certified to the fact and cause of the leaving behind. When the bark came back to Cette, the libellant did not demand, as of right, to be brought back, but asked the master whether he had filled his place. There appears to have been a dispute at this time between the master and the consul; for we find the latter certifying on the articles that the master refused to pay the full expenses of recovery and subsistence, though the man was injured in the service of the ship; and there is still a third certificate, not indorsed on the agreement, in which he says the master has paid one hundred and seventy-five francs for these expenses, though he had in fact paid only sixty-nine francs. The remainder must have been appropriated, by the master's consent, out of the money which he originally left for the wages of the seaman, and I understood the master to testify that the money was so obtained by the consul, though I do not know that he said it was done with his consent; but as he produces the certificate, and seems to have kept it for a voucher, his assent may be inferred. Here, then, we find evidence of a compromise, by which the master undertakes to bring home the man, and to have the whole sum left with the consul applied to the hospital expenses, which, after all, were only half satisfied. That this was the real purpose is evident; because the master, on his arrival here, tendered much more than was due for

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the home voyage, on his own theory of the contract, and says he did this to make up the loss of the wages which he says the consul had improperly retained.

Counsel have furnished me with no evidence of the construction of the Merchant Shipping Act, and I have not succeeded in finding any adjudged cases ; but the text-writers understand the law to be, that if the seaman is unable to proceed, and due certificate is made, the wages stop. This being so, it is not material to this case to inquire whether any fault of the libellant contributed to the injury, because that question only affects the liability for expenses and subsistence ; and it is neither pleaded nor proved in this case that the master desires to recoup from the wages the sums spent for these expenses, but he himself voluntarily undertook to pay them. So far as mere wages are concerned, it is admitted by the pleadings, and by the conduct of the master throughout, that the libellant is entitled to his wages for the time he actually served ; and the only dispute is, whether he is to have fifteen dollars or twenty-five dollars for the home voyage from Cette to Boston. In the uncertainty which arises from the direct contradiction between the only two witnesses who know any thing about the contract, the seaman must prevail, because sect. 160 of the statute requires the master to make his contract in writing before the consul, and declares that if he does not do so, the burden of proving the agreement shall be upon him ; and the only prominent and clear fact being that he took the man on board again, and the consul so certifying in the paper produced by the master, I infer that he took him upon the old terms, which would be a reasonable and just contract under the circumstances, even although wages were a little lower at Cette than at New York. Indeed, I do not know that it would not be a presumption of law, in the absence of any new contract, that the old one was either revived or treated as having been only suspended.

Wages to be made up at \$25 a month, deducting the time of libellant's absence from the vessel, and deducting all sums heretofore paid him. If this exceeds the sum tendered, he will have costs.

W. E. ROBBINS v. J. E. McDONALD.

SEPTEMBER, 1872.

Where a vessel was consigned to a certain wharf, which was full when she arrived, and the consignee offered to receive the cargo at an adjoining wharf, which was safe and suitable, but the master insisted on waiting until the first-mentioned wharf was unoccupied, — *Held*, he could not recover demurrage in a court of admiralty for the time lost by waiting beyond what would have been lost if he had accepted the offer.

DEMURRAGE. — The libel propounded that the schooner *Z. L. Adams*, commanded by the libellant, took on board a cargo of three hundred and fifty-three tons of coal at Philadelphia, 29th November, 1871, for which a bill of lading was given, reciting that the vessel was bound to "the Lowell R. R. Wharf, Boston, Mass.," and the delivery was to be at the aforesaid port of Boston, to the respondent or his assigns. Then followed the now usual clause, that, twenty-four hours after arrival and notice, there should be allowed, for receiving the cargo, at the rate of one day, Sundays excepted, for every hundred tons; after which there should be demurrage for every day, including Sundays; and the allegation was that the schooner was not fully unloaded until the twentieth day of December.

The cause was heard on facts agreed. The schooner arrived December 4, and found the railroad wharf in Boston occupied by vessels, and lay until the 13th, when the respondent asked the master to haul to another wharf of the same company on the other bank of the river, within the limits of East Cambridge, which he refused to do. A few days later the wharf on the Boston side of the river was clear, and the coal was landed there, and the freight was paid, and a certain sum was tendered for demurrage.

P. H. Hutchinson, for the libellant. We were not bound to go to East Cambridge. Our contract was to carry to the wharf of the company at Boston.

J. H. George & H. E. Morse, for the respondent. 1. The wharf at East Cambridge is within the limits of the port of Boston; and an agreement to deliver at the wharf of the Lowell

Railroad Company at Boston gave us the election to order the schooner to either wharf.

2. If we were bound to receive the coal only at the Boston side, yet our offer to take it at a suitable place equally convenient for the carrier ought to bar his damages, if he chose to decline the offer.

LOWELL, J. No evidence of usage has been given, and no authorities have been cited to fix the limits of the port of Boston as a term of description in a bill of lading in the coasting trade; nor have I found it necessary to inquire carefully into that subject, because, admitting that the wharf of the Lowell Railroad Company at East Cambridge is not within those limits, and that the consignee had no right to order the schooner to that wharf under pain of not earning freight in case of a refusal; and admitting further, that the freight was already earned before December 13, I am of opinion that the master, coming into a court of admiralty for damages, ought to show that the wharf proposed to be substituted was one at which he could not safely or conveniently unload his cargo, for some reason. The situation of the parties was this on the 13th of December: The time allowed by the contract for receiving the cargo had expired; the master was not bound to wait longer; he might land his coal at some other wharf, at least after notice to the consignee, and would have earned his freight. If he did wait, the consignee was bound to pay so much a day; and his assent to the waiting will usually be presumed. Now, suppose the master waits against the wish of the consignee, who has expressly authorized and required him to land the goods at another wharf, it seems to me that I could not interfere and say the master is entitled to wait until the wharf mentioned in the contract is free, against the expressed wish of the other party, at whose expense he is waiting. Suppose the consignee had sent lighters alongside, and offered to pay any additional expense that might come from discharging in that mode. Here a wharf, close at hand, safe and convenient, was offered him; and if it be divided by a political line from the port of Boston, — which I do not decide, — yet if no question of insurance or any other made a real difficulty, it seems to me he ought to have yielded, or, if not, that he cannot in this court recover the subsequent demurrage.

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The wharf was not named in the bill of lading for the benefit of the master, but for that of the consignee ; and if, on the arrival of the cargo, it happens that the latter cannot avail himself of that wharf, I am by no means prepared to say he may not order delivery at another. My decision, however, does not turn upon this, but upon the ground that if the master unreasonably insisted upon what I assume to be a strict right, he ought not to expect damages in a court of admiralty, when the detention was from choice rather than necessity.

The evidence does not enable me to assess the damages, because it does not give the number of days that were spent after the thirteenth before the vessel was hauled in. Assuming that the time of actual unloading would be the same at both wharfs, there should be deducted from the eleven days for which demurrage is demanded only so many as the vessel lay idle after the offer was made. I understood it to be admitted that a tender was made of eight days' pay, and I suppose this is about what is due, according to the rule above laid down.

Interlocutory decree for libellants. Damages to be assessed on the footing of this opinion. Question of costs reserved.

THE PAWASHICK.

SEPTEMBER, 1872.

In this court the law of England may be proved by printed books of statutes, reports, and text-writers, as well as by the sworn testimony of experts.

Some cases on this point examined.

Attention is called to statute 24 Vict. ch. 11, which authorizes and suggests that treaties should be made for facilitating the proof of the foreign law reciprocally, in the countries of the contracting parties.

A British shipmaster may proceed in this court for his wages against the British ship in which he served : *The Havana*, 1 Sprague, 402, followed.

The court will take jurisdiction of such a suit between foreigners, if the voyage is ended, and there is no contract binding the parties to another jurisdiction, and no reason given why justice cannot be done here.

LIBEL *in rem*, by Charles Finch, late master of the British bark Pawashick, of Summerside, Prince Edward's Island, for

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wages. The libellant and the claimant both lived at Summerside. The contract between the parties was as follows:—

“Captain Charles Finch agrees to take charge of bark Pawashick, for the sum of nine pounds sterling per month, from this date, and Robert T. Holman, the owner, agrees to pay that sum.

“SUMMERSIDE, P. E. I., Sept. 6, 1870.”

The vessel made several voyages under the libellant's command, and arrived at Liverpool in December, 1871, needing repairs, which detained her there for more than three months. The correspondence between the parties during this time, and the other proofs, tended to show that the owner wished to have a master who had received the certificate required for the commanders of merchant vessels in certain trades by the law of the flag; that the libellant had no certificate, and did not choose to apply for one; that no fault was found with his skill or conduct; that he was displaced by the agent of the ship on the 12th of February, 1872, and his wages were paid in full to that time; that the vessel was ready to sail from Liverpool early in April, and Finch then proceeded in the admiralty for an alleged balance of £48 10s. It was thereupon agreed in writing that he should receive £20, and a free passage home in the bark, and discontinue the suit, and settle with the owner at Summerside. The money was paid, but the libellant preferred to come home in a different vessel, in which he engaged as second mate.

C. T. Russell, for the claimant, contended, that no evidence had been introduced of the laws of England, which must, therefore, be presumed to be like our own, by which a master could not proceed *in rem*. If the court felt at liberty to examine the Merchant Shipping Act, and the decision of Judge Sprague in *The Havana*, 1 Sprague, 402, he should contend that the reasoning in that case was not sustained by the later cases in the supreme court, which refuse to recognize statute liens.

2. The court will not take jurisdiction of this case: it does not come within any of the exceptions mentioned in *The Becherdass Ambaidass*, 1 Lowell, 569.

3. The libellant has waived his lien, if he ever had one: *The William Money*, 2 Hagg. 136; *The Bolivar*, Olcott, 474; *The John*

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Lowe, 2 Bened. 394; *The Louisa*, 2 Woodb. & M. 49; *The Medora*, id. 104.

C. G. Thomas, for the libellant, relied on *The Havana*, 1 Sprague, 402.

LOWELL, J. In the admiralty, as in other courts, foreign law must be pleaded and proved, as a fact: *Talbot v. Seeman*, 1 Cranch, 1; *The Prince George*, 4 Moore, P. C. 21; *The Peerless*, Lush. 40; *Le Louis*, 2 Dodson, 241. The various modes in which such proof shall or may be made have been much discussed, especially in the United States, which are judicially treated as foreign to each other. The following text-books contain a reference to the decisions on this subject, some of which I shall have occasion to cite hereafter: Story, Conf. Laws, § 641; Wharton, Conf. Laws, § 771; Greenl. Ev. § 486, &c.; Bishop, Marriage and Divorce (4th ed.) ch. 23. But, first, I may observe that, upon the question of the master's lien, the case of *The Havana*, 1 Sprague, 402, is a precedent for my guidance. It has been ruled, indeed, in England, though without argument, that in the courts of that country the law of Scotland must be proved anew in each case: *McCormick v. Garnett*, 5 De Gex, M. & G. 278; and this is approved by Mr. Westlake, Private International Law, § 413, who says it would be entirely unsafe to refer to the proof in some preceding English case, because the foreign law may have been changed in the interval. But I find it more consistent with reason and analogy to presume the law to remain constant, until a change is proved, as in case of a local custom, which, proved in one case by a verdict and judgment, is taken to be true thereafter in that jurisdiction. It may be said that a local custom within the realm is the law of the realm, of which the courts will take notice, after they have once been judicially informed of it, while the foreign law is a fact as to which testimony may differ. But how can it be said that Judge Sprague's decision, that a British ship may be proceeded against by her master in this court for wages is not a decision of law, of which I am to take judicial notice, though its foundation may, in part, be a matter of fact? Lord Stowell, in *Dalrymple v. Dalrymple*, 2 Hagg. Consist. 54, 81, in enumerating the authorities he should cite to prove the law of Scotland, mentioned, first, "the opinions of learned pro-

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fessors given in the present or similar cases." And he quoted opinions given in a case which was tried more than twenty years earlier than the one then in judgment.

This case, however, will require some examination of the law of Great Britain besides that of the master's privilege against the ship, some other sections of the Merchant Shipping Act and their received interpretation, and I have, therefore, inquired whether I can receive in evidence the books of admitted authority, or must rely wholly on the sworn testimony of experts. Here, again, we find, in the case last cited, the eminent judge making reference to books of authority, and to adjudications of the Scottish courts. This celebrated opinion, from which extracts are made in several text-books, has been criticised by Lord Brougham as being in its method *ultra vires*, when it steps beyond the sworn evidence, and undertakes to discover and reason on the law of Scotland. Taylor, Evidence, § 1280, *note*. Mr. Taylor and other writers appear to agree with the *dictum*, that the foreign law, written or unwritten, must always be proved by an expert. 1 Roscoe, N. P. Ev. (13th ed.) 188; 2 Phillips (4th Am. ed.), 428. Mr. Westlake, sect. 414, points out that this criticism rests on *dicta*, rather than decisions. The cases that are supposed to have decided it are *Baron de Bode's Case*, 8 Q. B. 208, 246; *Sussex Peerage Case*, 11 Clark & F. 85, 114. What these cases actually decided was, that a scientific witness may testify to the written foreign law, with or without the text of the law before him, the value of the evidence resting in the soundness of his opinion, and the court not being supposed competent to criticise it by any comparison with the books. Before these cases, the law permitted codes or statutes to be proved by copies, authenticated to the reasonable satisfaction of the court, but was not supposed to require the aid of an expert in all cases. The rule was usually stated as in Story, Conf. Laws, §§ 640, 641, 642, that foreign written laws are proved by copies (giving various modes in which the copies may be verified), and unwritten laws by the testimony of skilled witnesses. The great stress laid, by the majority of the learned judges in *Baron de Bode's Case*, upon the comparative value of the opinion of a skilled witness, and of the mere text of a code, has led, I suppose, to the adoption by text-writers of the sweep-

ing generalization above mentioned. With deference to their opinion, I think Mr. Westlake's caution more safe; for the reasoning by which the opinion of the expert was exalted, and the illustrations made use of by the court, go very far to show that they would admit books of authority as well as sworn experts. Thus Lord Denman (p. 253) quotes with approbation, and as part of his reasoning, the language of Lord Ellenborough in *Picton's Case*, 30 How. St. Tr. 225, 491, that "text-writers furnish us with their statement of the law, and that would certainly be good evidence upon the same principle which renders histories admissible." And he adds: "A person states that the law is in a book; and a witness, having said that such book is considered of authority, it is received at once as evidence of the law in question." And again, "In questions of foreign law, books of the highest authority must frequently be resorted to: Pothier's works, for instance, as to the law of France upon contracts, bills of exchange, policies of insurance, and so on" (p. 254). The point to be decided being that an expert might state the result, the actual state of the law, without producing the codes, &c., the parallel of text-books which state such results was brought up. This argument hardly seems to countenance the doctrine that books are never to be received.

Lord Stowell, in *Dalrymple v. Dalrymple*, *ubi supra*, after mentioning as the first source of information of the foreign law the opinions of learned professors, adds, "secondly, the opinions of eminent writers, as delivered in books of great legal credit and weight; and, thirdly, the certified adjudications of the tribunals of Scotland upon these subjects. I need not say that the last class stands highest in point of authority."

I believe the rule thus announced is the true rule for this court in respect to the English law. I say this with a full knowledge of the criticisms that have been made upon it; and I will proceed to give my reasons for that opinion. The relations which we hold to England in the common origin of our laws, a similar mode of legal reasoning, the habit of studying and citing the English cases, the common language and frequent intercourse between the two countries, render it safe and proper to adopt a similar practice with respect to the laws of that country that the States

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of this Union have generally found it expedient to carry out in relation to each other. It was soon found, in trials in the United States, that the danger of mistaking the laws of the other States was, on the whole, a less evil than the danger of injustice and delay, if the strict proof were required in every case. In consequence of this discovery, many of the States have passed laws admitting the printed statutes and books of reports of the sister States to be read in evidence. See Story, Conf. Laws (Redf. ed.) § 641 *a*. But before these statutes were passed, or without their aid, the courts of some States have taken this step for themselves: *Thompson v. Musser*, 1 Dallas, 458; *Raynham v. Canton*, 3 Pick. 298; *Young v. Templeton*, 4 La. Ann. 254; *Lord v. Staples*, 3 Foster, 448. In two of these cases a query was made whether foreign statutes, strictly so called, could be proved by printed copies only, even with evidence tending to show the authenticity of the copies. But such statutes have been received in two cases, in which it was merely proved that they were bought of the public printer: *Jones v. Maffett*, 5 Serg. & Rawle, 528; *Certain Casks of Hardware*, 4 Law Reporter, 36; in another, because the code had been promulgated by the executive department of our government as authentic: *Talbot v. Seeman*, 1 Cranch, 1; in another, because the copy had been sent to the supreme court of the United States by authority of a foreign government: *Ennis v. Smith*, 14 How. 400. In that case it was said, as the *ratio decidendi*, that foreign written law may be received when it is found in a statute book, with proof that the book has been officially published by the government which made the law. This does not exhaust the list of cases, nor the actual or possible modes of authentication. The only rule to be made out of the late American cases is, that the copy of the statute must be shown, to the reasonable satisfaction of the court, to be genuine. Now we all know, and it is virtually admitted in this case, as I understand the argument, that we are fully as well able to verify the printed copies of the Merchant Shipping Act, as any expert could be. In the case in 4 Law Reporter, 36, Judge Betts said he should have received the statute without the oath which proved it to have been bought of the Queen's printer. The law is a progressive science, and, if printed books have superseded manuscripts,

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and are cited instead of certified copies, we may as well acknowledge the fact, and act accordingly. Between the doctrine, which has never obtained in America, if it does anywhere, that there must always be a sworn expert, and one which shall admit printed books of known authority to prove foreign statutes, I see no safe middle ground.

I believe it to be the true doctrine that the unwritten law of England may be proved in this court, not by experts only, but also by text-writers of authority, and by the printed reports of adjudged cases; and that the written law may be proved by the printed copies, and be construed with the aid of text-books as well as of experts. Conscious as I am of my liability, and that of the bar, to mistake the foreign law, if we rely on books alone, ready as we shall always be to receive instruction from scientific witnesses, yet I cannot but see the great delays, misunderstandings, and difficulties which attend any rigid exclusion of books in all cases. We are obliged by the present state of the law to look to such aids for determining the actual law of all the States of this Union, and the danger of mistaking the laws of England is the same in kind as that which affects an ascertainment of the laws of New York or Wisconsin, and less in degree than we may apprehend in dealing with those of Louisiana, or any State the base and origin of whose jurisprudence is wholly different from ours. Indeed, in this court I am bound to take judicial notice of all those laws, and, on principle, this must exclude the testimony of experts, which puts me at a much greater disadvantage than if I merely should admit the books subject to explanation and correction.

It is singular how little direct authority there is on either side of the proposition that English law-books may be read in our courts as evidence of English law. A great many cases are decided here every year which involve some points of that law; and I suppose the parties usually agree, either expressly or tacitly, that the books may be read. For instance, *Roberts v. Knights*, 7 Allen, 449, turned on the construction of the Merchant Shipping Act; and the report shows that the law was not proved by witnesses. *The Maggie Hammond*, 9 Wall. 435, decides points of English law which were not proved. In *Carnegie v. Morrison*, 2 Met. 381,

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404, Shaw, C. J., intimates an opinion that our relation to the English unwritten law is such that perhaps we need not rely on experts to prove it. It is plain, from a careful perusal of the whole passage, that he was prepared to control the opinion of very eminent experts by his own examination of what he rightly calls the authorities usually cited; that is, the reports of adjudged cases. In *Ennis v. Smith*, 14 How. 400, Wayne, J., delivering the opinion of the court, cites with apparent approbation a part of the same statement by Lord Ellenborough that was cited by one of the judges in *Baron de Bode's Case*, as above shown; namely, that the books of approved text-writers would certainly be admitted as evidence. I have seen no case in which it has been expressly decided that the common law of England must in all cases be proved by experts in the courts of America. I have cited some intimations and *dicta* to the contrary. The reason of the case seems to me to be that we should have the same liberal rule as has generally, though not universally, obtained with respect to the laws of the other States of this government. Again, I do not see how it would be possible, under the American practice, to reject certified copies of the decisions of English courts; and, if not, we come back to the question, whether an idle and unnecessary and obsolete mode of verification shall be insisted on. In respect to the laws of France, Germany, or Russia, or any other country which has a wholly different system from our own, I should be inclined to say that the rigid rule might be better; but I am dealing now only with the laws of England, and wish to be so understood. And I hold that those laws may be proved by such books as aforesaid, as well as by the testimony of experts.

Again, there is authority for the proposition that a court of admiralty may exercise greater liberality in such matters than other courts. Dr. Lushington, in 1860, having the decisions of the Queen's Bench and House of Lords in mind, as his remarks plainly show, explained and defended the practice of his court in waiving in fit instances strict technical proof by experts; and he admitted a printed copy of a statute coming from *quasi* official custody as evidence of the law of India: *The Peerless*, Lush. 30, 40. It may be added that the admiralty has, or at least

uses, somewhat greater control over the conduct of causes than is usual in other courts. It may decline jurisdiction in some cases, or it may require further proof when necessary, and, in short, may adapt its practice to the exigencies of each case.

In *The Maggie Hammond*, 9 Wall. 452, Clifford, J., delivering the judgment of the court, appears to adopt for courts of admiralty a liberal rule; for he cites from Bell's Commentaries, to show that maritime law partakes of an international character, and that in all discussions respecting the same in the courts of Scotland the continental collections and treatises on the subject are received as authority.

I do not, however, feel compelled in this case to rely on any peculiar practice in the admiralty, for I consider that the better rule is that in the federal courts here, while the English law is undoubtedly to be pleaded and proved, yet evidence is competent which consists only of books of acknowledged or ascertained authority, and that, to prove that authority, an oath is not necessary in all cases. The proposition that Abbott on Shipping, and the regular reports of decisions of the courts, and the various books cited as authority for the law in England, cannot be read for this purpose here, appears to me little less than absurd.

There are, of course, a great many nice and intricate points of English law on which a court of this country would be unwilling to pronounce, with no aid but from books of authority. Such points are not, perhaps, so likely to arise in the admiralty as in some other courts; and, when they do, a court of admiralty can, as I have intimated, take means to obtain instruction. Unfortunately, too, it is conceivable that experts may differ in opinion. No single strict rule is adequate to insure correctness on all occasions. In respect to cases of delicacy and importance, I would call attention to the act 24 Vict. ch. 11, which gives power to the courts, when they have before them a suit which involves the law of a foreign country, to cause a statement of the facts or special case to be prepared and submitted to one of the courts of that country for the decision and certificate of the foreign law; and so, reciprocally, of questions arising in other countries involving the law of England. This statute is in the nature of a proposition to other governments, and is to take

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effect only when treaties shall have been made providing for its operation. But it seems to me to embody a very useful suggestion; and I hope our government will consider whether it may not be adopted to advantage.

The claimant further objects that the master's privilege against the ship cannot be enforced in our courts. Judge Sprague's opinion in the case cited was that such a lien was not merely a remedy to be enforced in the domestic forum, but that it created a right in the thing which any court of admiralty could give effect to. I see no reason to re-examine that opinion. It is true, as was argued, that the supreme court, after Judge Sprague's decision was made, showed a disinclination to enforce the laws of the States giving liens for building and repairing ships, and changed the twelfth admiralty rule in that sense. But this action was explained in *The St. Lawrence*, 1 Black, 522, and *The Potomac*, 2 id. 58, as being founded on expediency, and not on any doubt of the jurisdiction; and at the last term of that court, the rule has again been modified, so that the district courts now have jurisdiction of all admiralty liens, whatever their origin; and the decision in *The Havana* has been approved, and its reasoning has been followed and expanded, by Clifford, J., delivering the opinion of the supreme court in *The Maggie Hammond*, 9 Wall. 450.

This court, then, has jurisdiction, though it is not bound to exercise it in circumstances of hardship to the defendant, or any others which make it more expedient to remit the parties to the home tribunals. I examined the law of this subject with some care in *The Becherdass Ambaidass*, 1 Lowell, 569. Without attempting, in that case, to lay down any general rule, I mentioned some cases in which jurisdiction had usually been taken. Among them were cases like *The Havana*, in which the voyage ended, or was broken up, within this jurisdiction. This case is not without analogy to those; because, though the voyage did not end here, it was ended before the parties came here: so that there was no allegation on either side of a continuing connection or contract between the parties; and it resembles any other case in which two British subjects are in court, one of whom asserts the right to proceed against the vessel of the other. By one section of the

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Merchant Shipping Act, seamen who have engaged for a voyage ending at home are not to sue for their wages abroad: that means, of course, while the voyage is yet unfinished, not that, months or years afterwards, if wages are still due them, they may not sue wherever they can find jurisdiction. I cite this merely by way of illustration of the most usual cases in which the courts have remitted parties to their home. It has been when they have seen that they were *prima facie* bound to proceed and finish a voyage, but undertook to ask a foreign court to relieve them of that duty. Thus, in the case above cited, I was asked to say that a foreign contract, which required the libellants to finish a voyage, was void by the foreign law; not that its terms had been broken, not that there was cruelty, misconduct, or even deviation, on the master's part; but I was called on to annul a contract which appeared to be reasonable, and to be in the course of proper fulfilment, on the mere ground of an insufficient description of the voyage to comply with a real or supposed statute obligation. That I refused to do.

In this case, there is evidence that the libellant arrested the ship, or at least extracted a monition in a proceeding against her, in England; that there he was paid £20, and agreed to discharge that proceeding and settle his dispute with the owner at their common home. It is argued that this agreement is to be construed as a definitive and perpetual release of the ship, and an undertaking to settle by some other form of action, if suit should become necessary. I do not so read the paper. It seems to be merely a discharge of that suit, remitting both parties to all their former rights. The mention of home means that the libellant will forbear all further action of any kind in England, and until he has an opportunity to meet the owner at home. And it appears that the parties met at home, and failed to settle this controversy. The libellant thereafter had all rights and remedies he had ever had for any balance that might be due him after crediting the £20. If this suit were vexatious, that the libellant, having ample opportunity, omitted to sue at home, with the hope of extorting a settlement by arresting the vessel here, — which has been suggested, indeed, but not proved, — or any other evidence of vexation or oppression, I should hold my hand; but, the case being bare of any such facts, I take jurisdiction.

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The title of the libellant to relief on the merits of his case is not so plain. His engagement was for an indefinite time, at so much a month. The master is not a ward of the admiralty in the same sense as the seamen. His contract is construed very differently, and much more like any ordinary agreement of agency. Thus it is held in England that his wages do not depend on the earning of freight, and it is said that they may be insured: *Hawkins v. Twizell*, 5 Ellis & B. 883.

Under a contract of this sort for an indefinite time, either party may end it on reasonable notice to the other, at least when no voyage is in progress; and in such a port as Liverpool, where, on the one hand, employment may be obtained, and, on the other, a master can be readily found, I do not know that any notice would be necessary: *Curtis on Merchant Seamen*, 165; 3 Kent, Com. 161; *The Crusader*, 1 Ware, 448. In this case, the libellant had notice that the owner wished to obtain a master who had a certificate; and the libellant did not care to apply for a certificate, — which would be good cause for his removal, if cause were necessary. If it be said that, by analogy to other seamen discharged abroad, the master is entitled to a passage home, that was offered him, and declined. I do not fully understand how the board in Liverpool comes to be charged; for, when the libellant rendered his account in his own way on the 21st of December, he charged merely his wages; and, again, he gave a receipt in full for his wages to the 12th of February, at the regular rate; no charge, so far as appears, being then made for board. I confess to some doubt whether it was his intention to charge his board to the owner until he found he was displaced. However this may be, the £20 that were paid him appear to me enough to pay for any board, wages, or other damages which the owners ought to meet; and that payment, with the offer of the passage home, should have been satisfactory to the libellant. The £48 which he demanded included wages for three months after his actual services were ended, and board for the whole time he was in Liverpool. Under the contract which he made, no such damages could be awarded for a discharge in the port of Liverpool after the end of a voyage. In my opinion, he has been overpaid.

Libel dismissed.

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THE WILLIAM GILLUM.

SEPTEMBER, 1872.

A usage in the coasting trade to carry a part of the cargo, if heavy and imperishable, on deck, is reasonable.

Such a usage found in this case.

If such a deck-load be jettisoned, the ship and freight are liable to contribute for the loss in general average.

This contribution may be recovered by a libel against the vessel for a total loss.

Whether the shippers of goods under deck, who did not actually assent to the shipment, would be liable to contribute, *quære*?

AFFREIGHTMENT.—The libellants proceeded for thirty-three tons of pig-iron short delivered out of two hundred tons, shipped at Philadelphia, for the Bay State Iron Company at Boston, by the schooner William Gillum, under a bill of lading in the usual form. The answer set up that in a gale it had been necessary to throw overboard this part of the cargo, for the safety of the rest. Of the two hundred tons, fifty had been stowed on the deck of the schooner; and of the quantity jettisoned a little less than one-half was under deck, for which the libellants had received contribution in general average, and made no further claim; but they demanded payment in full for that which had been thrown over from the deck. The claimants introduced evidence of a usage in the coasting trade to carry a part of such heavy and imperishable goods on deck, say from one-eighth to one-quarter of a full cargo, and that it made the vessel easier in a sea. The libellants showed that the underwriters had not recognized such a usage, and that masters who carried such goods on deck often inserted a memorandum to that effect in the bill of lading, and that others were in the habit of insuring their deck cargo at the expense of the ship.

T. K. Lothrop & A. Lincoln, for the libellants. The simple and consistent rule of law is, that if a deck-load is carried by the master, without the consent of the shipper, the risk is the ship's. Granting that a general, uniform, and long-established usage might be evidence of consent, yet the proof in this case falls far short of these requisites. We rely on the following cases, and especially the first: *The Paragon*, 1 Ware, 326; *The Rebecca*, id.

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187; *The Waldo*, Daveis, 161; *Vernard v. Hudson*, 3 Sumner, 405; *Sutton v. Kettell*, 1 Sprague, 809; 1 Pars. Shipp. & Adm. 185, 186; Flanders, Shipp. §§ 191-195.

F. Goodwin, for the claimants. The origin of the law is usage, and that is founded on the reasons that a deck-load is in more danger than goods stowed in the hold, and that it hinders the working of the ship. But we prove here that a reasonable quantity of pig-iron on deck is in no danger of injury, and rather helps than hinders the working of the vessel; and *cessante ratione*, &c. Besides, the usage is valid, and varies the general rule: *Chubbs v. 7,800 Bushels of Oats*, 26 Law Reporter, 492; *The Neptune*, 2 Marit. Law Cas. 456; 1 Pars. Shipp. & Adm. 352, 356, and notes; Valin, book 3, tit. 8, art. 12; *Gardner v. Smallwood*, 2 Hayw. (N. C.) 349.

After the case was submitted to the judge, he sent word to the parties that he should wish to hear argument on the question, whether, if the usage was proved, the ship and freight were liable to a general average contribution. Thereupon written notes were exchanged between the counsel and sent to the judge, in which it was insisted on the part of the libellants, and admitted on the part of the claimants, that there was such a liability; but it was urged, that if a decree were entered for the libellants on that ground it ought to be without costs.

LOWELL, J. The evidence appears to me to establish the usage contended for by the claimants, which is, that in coasting voyages of this character, where there is a full cargo, consisting, in large part, of heavy goods, like pig-iron, a portion of the cargo, not exceeding one-quarter, is carried on deck; and that such a custom is reasonable, applying, as it does, only to merchandise which is not liable to be injured by wet, nor to be readily washed overboard, and as such stowage tends to make the vessel steadier and easier in rough weather. If such a usage is proved, and nothing more, it relieves the master and owners of the ship from liability for bad stowage: 3 Kent, Com. 240; Abb. on Shipp. part 4, ch. 10, § 3; *Chubb v. 7,800 Bushels of Oats*, 26 Law Reporter, 492; *Toledo Ins. Co. v. Speares*, 16 Ind. 52; *Dodge v. Bartol*, 5 Greenl. 286.

Who is to bear the loss, when there has been a jettison of

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goods thus lawfully laden on deck, is not so clear. In the case cited from Greenleaf's Reports, the jury found not only a usage to stow on deck, but a usage "having the force of law," that the shipper of the deck-load took the whole risk of jettison, the ship not being liable even for contribution. And this law, thus found by a jury, has remained the law of Maine: *Cram v. Aiken*, 13 Maine, 229; *Sproat v. Donnell*, 26 id. 185. A like usage was said to exist in New York: *Smith v. Wright*, 1 Caines, 48; but I understand the law of that State to be otherwise at present, and that in that jurisdiction goods stowed on deck, in virtue of a general usage, are contributed for: *Harris v. Moody*, 4 Bosw. 210; s. c. 30 N. Y. 266. In England, on the other hand, a usage was proved in the timber trade, that the ship took the whole risk of the deck-load: *Gould v. Oliver*, 2 M. & G. 208; and afterwards, in the same trade, the usage was shown to be that the ship and freight contributed, but not the goods under deck; and still another usage, that the underwriters on the ship did not undertake this risk, unless it were expressed. Between the two usages first mentioned it would seem more reasonable that the ship should bear the whole loss rather than the freighter; because the master, who decides what part of his cargo he will carry on deck, is the agent of the ship in that matter. The question whether the ship and freight ought to contribute to such a loss is open for decision in a libel for the whole value of the goods, because the greater includes the less: *Dupont de Nemours v. Vance*, 19 How. 162. In deciding it, I might perhaps rest upon the admission of the claimants' counsel; but as that may have been intended only for this hearing, and the cause is not unlikely to go farther, I have examined the point, and will express my views upon it.

The weight of modern authority favors such a contribution. It was formerly laid down by writers on this subject, in general terms, as the law of the commercial world, that the deck-load contributes to general average if saved, but is not contributed for if lost; but it is probable that this broad statement was intended only for those cases in which the deck-load was unlawfully carried, or, at most, when it was carried by a private arrangement between the particular shipper and the master.

The William Gillum.

Thus Chancellor Kent, after stating the general rule, without qualification, in the text of his Commentaries, adds, in a note, after citing certain cases: "But if they be laden on deck according to the custom of a particular trade, they are entitled to contribution from the ship-owner for a loss by jettison, *Gould v. Oliver*, 4 Bing. N. C. 134:" 3 Kent, Com. (5th ed.) 240, and note (a). The case of *Gould v. Oliver*, cited in this note, established the point in England, if it were not already put at rest by *Da Costa v. Edmunds*, 4 Camp. 142; and the same doctrine obtains in the more recent cases in the United States. It is considered by the text-writers to be the sounder opinion. See *Hurley v. Milward*, Jones & Carey (Irish Exch.), 224; *Milward v. Hibbert*, 3 Q. B. 120; *Johnson v. Chapman*, 35 Law J. N. S. (C. P.) 23; *Merchants' Ins. Co. v. Shillito*, 15 Ohio St. 559; *Gillett v. Ellis*, 11 Ill. 579; *Toledo Ins. Co. v. Speares*, *ubi supra*; *Meaher v. Lufkin*, 21 Texas, 383; besides the case above cited from New York; Phillips, Ins. §§ 460, 1282; 1 Pars. Shipp. & Adm. 354, &c.; Marshall, Ins. (5th ed.) 482; Arnould (3d ed.) 776; Abb. Shipp. pt. 4, ch. 10, § 3, and Mr. Justice Shée's note to English edition and Mr. Perkins's note to American edition. These writers give all the reasoning and learning on the subject. I have seen no better statement than that of the superior court of Connecticut, in 1773: "The court determined that although stock upon deck is more exposed to danger, and in a storm exposes the vessel to greater risk, than goods in the hole,¹ yet as it is the universal custom to ship goods in the hole, with stock upon deck, when the stock upon deck is thrown overboard for the express purpose of saving from destruction the cargo in the hole, it is but reasonable that the cargo saved should bear a proportion of the loss which was the price of its ransom." *Brown v. Cornwall*, 1 Root, 60. I am aware that some of the late cases are of shipments by steamers which are so built that the main deck is the ordinary and proper place for the bulk of the cargo to be stowed, so that it has been held, as matter of law, that the rule against deck-loads did not apply to them: *The Neptune*, cited by the claimants, and reported on appeal in 6 Blatch. 193. But the

¹ So spelled in the report.

cases cited from the courts of Indiana and of Texas are not of that kind ; and in most of the others the usage was proved, and was the foundation of the decision, and the character of the vessels was relied on only to show that the usage to carry goods on deck was reasonable, and must have been known to the shippers by such vessels. In *Lawrence v. Minturn*, 17 How. 100, and *Slater v. Hayward Rubber Co.*, 26 Conn. 128, the question of contribution was expressly reserved.

The only recent decision which denies contribution was one in which the deck-load was shipped by special arrangement and not by usage: *The Milwaukee Belle*, 9 Am. Law Reg. n. s. 311. Judge Miller there relies very much on *Lawrence v. Minturn*; but he overlooks the fact that in that case Mr. Justice Curtis carefully omitted to decide the point. See 17 How. 115. "His right to contribution is not involved in this case." All that I now decide is, that the ship and freight must contribute to the loss. The other interests are not represented here ; and the general average adjustment, which was made up and acquiesced in by both the parties to this suit, relieves the other shippers. It was argued by the claimants that it went farther, and estopped the libellants from making any claim against the ship and freight ; but the evidence was, that all those rights were expressly retained, and that the settlement of the average was made without prejudice to this suit. A late writer on average, speaking of the practice of underwriters in England, which he does not think entirely satisfactory (because, as I suppose, it does not give sufficient weight to the law as laid down in *Gould v. Oliver* and *Milward v. Hibbert*), says : "The loss of goods and freight thrown overboard from deck is apportioned on the value of the ship, the net freight, and the cargo, including what is jettisoned. If there be goods below deck, the property of an innocent shipper, i.e., one who has no goods on deck, and was not consulted about the vessel carrying a deck-load, his value is to be omitted from the contribution, or, by the practice of some, is brought into the apportionment, but the ship pays that shipper's quota." Hopkins, Handbook of Average, 37. The former of these modes appears to be appropriate to the present case ; because, as I say, the parties here, by their settlement,

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released the other shippers, who, perhaps, would be liable upon proof of such a custom as I find to be proved here. At all events, I see no reason why the ship should bear their share of the loss, nor do I understand that either party contends for this.

It will be easy for the parties, I suppose, to make their settlement on the basis of this opinion. I see no reason why the libellants should not recover their costs. It is true that they demanded more than they will recover ; but the supreme court have decided that they may properly recover a general average loss in such a suit ; it is, therefore, like any other case in which a recovery is had of part of the sum demanded. To stop costs, the claimants should have tendered the amount due for their share of the loss ; especially so in this case, because the course of their defence is such that they can hardly deny, and, as soon as called on to argue the point, they at once admitted, a liability for this lesser amount ; for they contend the usage is notice to all the world, and puts these goods on the precise footing of under-deck goods.

Interlocutory decree that the libellants recover a general average loss, to be adjusted hereafter if the parties do not agree.

UNITED STATES v. JAMES TETLOW.

SEPTEMBER, 1872.

The act of congress of March 2, 1867, 14 Stats. 548, adopts the modifications, conditions, and restrictions upon imprisonment for debt then existing by the laws of the several States, and the course of proceedings which may thereafter be adopted therein.

The United States, as plaintiffs in an action at common law, are not exempt from the provisions of that act by virtue of their prerogative.

The process and forms of proceeding adopted by congress from the State laws are binding on the United States.

The act of 1798, authorizing the secretary of the treasury to discharge poor imprisoned debtors of the United States, does not prevent the act of 1867 from being availed of by a debtor imprisoned at the suit of the government. The remedy is cumulative.

LOWELL, J. The defendant was arrested on mesne process at the suit of the United States, in an action of assumpsit for the amount of certain taxes assessed upon him as a manufacturer ; and, having been surrendered by his bail, is now imprisoned on the

writ. He duly applied to a commissioner of this court to take the oaths prescribed by the Gen. Stats. of Mass. ch. 124; and the district attorney was duly notified, and attended the examination. The commissioner found him entitled to take the oaths, but refused to administer them, on the sole ground that a debtor to the United States is not within the act of March 2, 1867, 14 Stats. 543. This is the question now presented for decision.

The statute of Feb. 28, 1839, 5 Stats. 321, enacted that no person should be imprisoned for debt in any State on process issuing out of a court of the United States, where, by the laws of such State, imprisonment for debt had been abolished; and that where, by a law of the State, imprisonment for debt should be allowed under certain conditions and restrictions, the same conditions and restrictions should be applicable to the process of the United States. By the act of Jan. 14, 1841, 5 Stats. 410, the statute of 1839 was to be construed to abolish imprisonment for debt in all cases whatever, where, by the laws of the State, imprisonment for debt had been, or should be, abolished. These statutes were held not to be applicable to Massachusetts; because the poor-debtor law of that State of 1855 did not abolish imprisonment for debt, and so was not within the act of 1841, but was a law allowing such imprisonment under certain conditions and restrictions which brought it within the act of 1839, which was not prospective, and did not adopt future State laws: *Freeman's Case*, 2 Curtis, C. C. 491; *Campbell v. Hadley*, 1 Sprague, 470. It was further decided that a debtor who had been lawfully relieved from imprisonment upon his debts, under the general insolvent law of Massachusetts, was yet not entitled to have the execution modified so as not to run against his person; because the insolvent law of Massachusetts was neither a law abolishing imprisonment for debt generally, nor allowing it under certain conditions and restrictions, but one which abolished it only in its relation to certain individuals: *Catherwood v. Gapete*, 2 Curtis, C. C. 94. That case differed from *Beers v. Haughton*, 9 Pet. 329, in this, that the circuit court for the district of Ohio had adopted the insolvent law of that State, and our court had never adopted the law of Massachusetts. The decision in *Freeman's Case* likewise pointed out the objection which had prevailed in

Palmer v. Allen, 7 Cranch, 550, and in others, that the federal courts cannot exercise powers bestowed by State laws on State officers, nor can congress require or control their exercise by the State officers.

The act of March 2, 1867, 14 Stats. 548, on which this petitioner relies, was plainly and pointedly intended to apply to Massachusetts; for it addresses itself to the very points ruled in the cases just cited. It not only provides a federal officer to take jurisdiction of such cases, but adopts the modifications, conditions, and restrictions upon imprisonment for debt then existing by the laws of the several States, and the course of proceedings which shall thereafter be adopted therein; and provides for the discharge of any defendant arrested on mesne process or execution issuing out of the courts of the United States, who would be entitled to his discharge on like process from the State courts, thus obviating the precise difficulties, and all the difficulties, upon which the case of *Freeman*, and most of *Catherwood v. Gapete*, were decided. It will not now be necessary to examine in detail the many and interesting cases which concern the application of State insolvent laws to United States process in general; because it cannot be doubted, and has not been questioned in argument here, that the poor-debtor law of this State, passed in 1855, and embodied in ch. 124 of the General Statutes, has been adopted by congress in the act of 1867, so far as it relates to private persons suing and being sued for debt in actions at common law. The point remaining for judgment, and which has received careful consideration at the bar, is, whether the United States, when they appear as plaintiffs in such an action, are within that statute. The argument of the district attorney is that the sovereign is not bound by a general act of the legislature, unless named in it. This is a maxim of English law; but the exceptions to it are neither few nor unimportant. In *Willion v. Berkley*, Plowd. 223, this maxim was learnedly discussed, and a majority of the court decided that the king was bound by the statute *de donis*. It is said by learned writers that the king is impliedly bound by statutes intended to remedy a wrong, because, being the fountain of right, he cannot wish to persevere in wrong; and by acts for the public good, the relief of the poor, the general

advancement of learning, religion, and justice, and the prevention of fraud: Bac. Abr. Prerog. E. (5); Broom's Maxims, 51; Chitty's Prerog. 382; and that he is not bound by acts which would divest him of any of his prerogatives, such as the statutes of limitation, insolvency, bankruptcy, and set-off: Broom, 52. Mr. Chitty goes so far as to say that acts which would divest or abridge the king of his prerogatives, his interests, or his remedies, in the slightest degree, do not in general extend to or bind him, unless he is expressly named: Chitty's Prerog. 383. I am not prepared to admit this statement of the learned author, made in 1820, as expressing the true limitations of the doctrine at this day in England, nor as being entirely consistent with itself; for I have seen decisions in which statutes which appear to me to abridge the king's remedies have been held to extend to him, though not named. But I shall not stop to discuss this point. What I am concerned with is, that no such broad extent of prerogative exists in this country, in my opinion. It is true that the courts of most of the States, following an early decision in Massachusetts, have held that statutes of limitation do not bar the sovereign: *Stoughton v. Baker*, 4 Mass. 522; *People v. Gilbert*, 18 Johns. 227; *Com. v. Baldwin*, 1 Watts, 54; *United States v. Hoar*, 2 Mason, 311; and many other cases. Mr. Sedgwick traces the doctrine to feudal notions of prerogative not compatible with our polity, and commends the action of those States which have changed it by statute: Sedgwick, Const. and Stat. Law, 106. But the rule is too firmly established to be changed, excepting by legislation, which, however, has generally been called in to modify it. This exception of the sovereign from the statute of limitations has usually been defended in this country upon a reason equally applicable here as in England, that public remedies ought not to be lost by the laches of public officers. No such reason exists in the case of bankruptcy, insolvency, or set-off; and no such course of decisions has been made on those subjects. Set-off has always been allowed against the United States, by virtue, no doubt, chiefly of the act of March 3, 1797, 1 Stats. 512; it has never been refused on the ground of prerogative in any case not coming strictly within that statute, when it would have been allowed to a private person: the language of the

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judges certainly does not seem to countenance any such distinction: *United States v. Ringgold*, 8 Pet. 150; *United States v. Macdaniel*, 7 id. 1.

With regard to insolvency, the cases are not agreed. It has been held in New York and Pennsylvania that the sovereign is not bound, and, in Maryland, that he is bound: *People v. Rossiter*, 4 Cowen, 143; *People v. Herkimer*, id. 345; *Com. v. Hutchinson*, 10 Penn. St. 466; *State v. Walsh*, 2 Gill & J. 406. None of these cases appear to have been much argued or carefully considered. Against them I may well set, in this connection, the decision of Mr. Justice Thompson, of the supreme court of the United States, in *Stearns v. United States*, 2 Paine, 300, who held, reversing the judgment of the district court of Vermont, that a defendant, sued by the United States in a State court, and committed to jail on execution, could be lawfully discharged under the poor-debtor law of Vermont. "The United States," says the learned judge, "are a body corporate, having a capacity to contract, to take and hold property, and, in this respect, stand upon the same footing with other corporate bodies; and if they will prosecute their suits in the State courts, and avail themselves of the State laws for this purpose, it is not perceived that any good reason can be given why such State process as they use, for the purpose of enforcing their right, should not be subject to the State law." He goes on to say that if the suit had been prosecuted in the courts of the United States, different considerations might have been presented. He alludes, of course, to the consideration whether the State law had been adopted by congress, which, I suppose, the law of Vermont then in question had not been, because the cause of action probably arose before the passage of the process act of 1828; but, as no dates are given in the report of the case, I cannot affirm this with positiveness. That point is not important here; because the act of 1867, as we have seen, undoubtedly does adopt the poor-debtor law then, as now, existing in Massachusetts. What that case does decide, both necessarily and expressly, is, that the United States are not excepted out of the poor-debtor law of Vermont by virtue of any prerogative. I have seen but one case which says that a State is not barred by a discharge under the bankrupt act either of

1841 or of 1867: *Com. v. Hutchinson*, 10 Penn. St. 466, above cited. That case goes upon an entire misapprehension. The learned judge who delivers the opinion of the court says, very truly, that the king of Great Britain is not bound by similar acts; and, for the American law, he relies on *United States v. King*, Wall. Sen. 12, decided on the bankrupt act of 1800, and says that he has compared that act with the law of 1841, and finds nothing to distinguish them in this particular. Now, it happens that sect. 62 of the act of 1800 expressly excepted "any right to or security for money due to the United States or to any of them;" and *United States v. King* merely gave the true and necessary construction to these words, while the act of 1841 contains no such exception. But the discharge of the person of a poor debtor, and a discharge of the debt, depend on very different considerations, and the laws of the United States have always so treated them.¹

Again, prerogative, as now understood, does not extend to matters of process and remedy, excepting always the statute of limitations, which is held to touch only the remedy. "The crown," says Pollock, C. B., "is not bound with respect to its property or person, but is bound with respect to the practice in the course of the administration of justice:" *Atty.-Gen. v. Radloff*, 10 Exch. 94. And so it has been held that the crown was bound by an act requiring all writs of error to be brought in the exchequer chamber: *Rex v. Wright*, 1 A. & E. 434. In the learned discussion by the plaintiff's counsel in that case, it is said that the rule of exemption applies only to the property or peculiar privileges of the crown. This decision was followed in *De Bode v. Reg.*, 14 Jur. 970. In this country, a very able and learned argument was made by Nott, J., to prove that the United States are not bound by the acts admitting parties to be witnesses: *Jones v. United States*, 1 Ct. of Claims R. 388; but the supreme court of the United States has decided that they are bound: *Green v. United States*, 9 Wall. 655. Another case, which the counsel of the debtor rely on, is *United States v. Knight*, 14 Pet. 470, in which it was held that the United States are bound by the statutes of Maine, giving prisoners the privilege of jail limits. If any

¹ It has now been decided that the United States are not bound by a discharge in bankruptcy: *United States v. Herson*, 20 Wall. 251.

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general rule can be laid down, it is that the United States are bound by laws of remedy and of process; though it really depends upon the intent of each act. Take, for example, the eleventh section of the judiciary act of 1789, 1 Stats. 79, which declares that no person shall be arrested in one district for trial in another in any civil action; and that no civil suit shall be brought against an inhabitant of the United States in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ: has it ever been doubted that the United States, as a party plaintiff in a civil action, is bound by both these restrictions? And yet the language of the act of 1867 is equally broad, that any defendant arrested, &c., shall be entitled, &c. It resembles entirely the language of the act of which Tindall, C. J., said, in *Rex v. Wright, ubi supra* (at p. 447), "In the case, therefore, of an act of parliament, passed expressly for the further advancement of justice, and in its particular enactment using terms so comprehensive as to include all cases brought up by writ of error, we think there is neither authority nor principle for implying the exception of criminal cases, on the ground that the king, as public prosecutor, is not named in the act." It may be said that this statute really deprives the plaintiff of a right. But to this it is answered, that the United States have no right or prerogative to arrest a debtor on mesne process in an action of assumpsit, excepting what is derived from the process acts of the State adopted by congress in 1789 and 1792; and, therefore, when the practice of the State has been changed, and congress have assented to and adopted the change, the United States, like all other plaintiffs, must conform. It will hardly be maintained that the prerogative here extends to the limits once demanded for it in England, that the sovereign may take advantage of all acts of parliament, but shall not be bound by them. If the conditions and restrictions now imposed on imprisonment for debt had existed in 1789, it is perfectly clear that the United States would be bound, because it is under the State practice then adopted alone that it has any right of arrest; and the true way to look at the process act is, that the amendment is incorporated with it so as to make, as it were, but one statute; and so the result is clearly reached, that all process is included, whether for

the United States or any other party. Another answer is, that the right to imprison a defendant ought not to be held to be a prerogative right, unless the statute expressly makes it so.

It is further contended for the government that congress has fully legislated upon this subject, by numerous acts, giving power to the president, the secretary of the treasury, and the postmaster-general, respectively, to discharge from prison poor debtors of the United States, in the manner and upon the terms pointed out by these acts. In the case of private persons, it has uniformly been held that the act of congress of June 2, 1800, 2 Stats. 4, is cumulative only; and so, even, as to the United States in respect to jail limits: *United States v. Knight*, 14 Pet. 301; *Campbell v. Hadley*, 1 Sprague, 471. In *Duncan v. Darst*, 1 How. 309, Mr. Justice Catron says: "It is insisted for the defendant in error that the act of congress of 1800, ch. 4, for the relief of persons imprisoned for debt, is the only law by which a discharge can be had from a *ca. sa.*, awarded by a court of the United States. We do not think so." He then refers to the provisions of that act as being inconvenient in comparison with the State laws, and proceeds: "So there are other modes of discharge prescribed by the State laws that can be executed just as conveniently and properly by the federal courts and judges, in cases where the execution issues from the latter courts. State laws of this description have been adopted by the acts of congress as incident to the remedy: they are cumulative, and in addition to the act of congress of 1800, both being in force. As we have adopted in effect the same construction where property was to be levied on, in *Amis v. Smith*, 16 Pet. 312, it would be harsh to hold otherwise in restraint of personal liberty." The act of June 6, 1798, authorizing the secretary of the treasury to discharge the poor imprisoned debtors of the United States, is very analogous to the poor-debtor law of Massachusetts, and anticipates its wise and humane policy by some forty years. It is not, however, as convenient in its practical operation; and I can see no reason why it should not be considered cumulative, as well as the act of 1800, in relation to private debtors. This latter act excludes public debtors by name; but this, no doubt, was because they had already been provided for by the act of 1798. There is no such exception in the act of 1867.

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The act of March 2, 1831, 4 Stats. 467, and five acts passed to amend that act, and keep it alive, down to 1843, which were cited at the bar, do not relate to imprisoned debtors at all, nor to a release from imprisonment. The secretary of the treasury was already invested with power over that subject by the act of 1798. Those laws were for the discharge of the debts due the United States in certain cases when the debtors were insolvent, and resemble a bankrupt law.

I have not overlooked the decision of Judge Hopkinson, cited and relied on by the government. No one can differ from that learned and able jurist, without great doubts of the soundness of his own opinion; but there are some considerations affecting the case, which I may state. Judge Hopkinson relies largely on *United States v. Green*, 4 Mason, 427, in which Judge Story decided that the United States could sue in the district court as indorsee of a note, though the original holder could not have sued in such court. Judge Hopkinson cites this case as if it had turned on the point of the United States being bound by an act in which they are not mentioned, whereas Judge Story relies but little on that point, and expressly puts his decision on the act of 1815, which gives the district courts jurisdiction of all suits at common law in which the United States sue, and says he should have had very great doubt but for that act. Again, several of Judge Hopkinson's objections have been carefully met and obviated by the statute of 1867; for they were objections like those found in this circuit, and went to the application of the act in the federal courts, under all circumstances. Judge Hopkinson says his opinion is opposed to one given by Judge Betts in the southern district of New York, of which I have seen no report. And, finally, I consider that congress, by passing the act of 1867, manifest an intent to persevere in the wise and humane policy of giving to debtors arrested under federal process the advantage of the State laws, notwithstanding the objections raised against it, though, at the same time, they try to obviate those objections as far as practicable.

Defendant discharged.

F. Dabney, for the United States.

T. K. Lothrop & R. R. Bishop, for the defendant.

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Re E. W. CLAP. — Ex parte G. G. TARBELL.

SEPTEMBER, 1872.

Upon the death of one member of a firm, the survivor is bound in equity to apply the joint estate to the payment of the joint debts; and the representatives of the deceased partner, and, in case of bankruptcy, the creditors of the firm may enforce this equity.

A partner, by his will, made his brother, who was his copartner, executor, and devised to him the residue of his estate in trust for certain purposes, and authorized him to use in his business the property given him in trust, until it should be wanted for distribution. *Held*, that the intent of the will was, that the residue only should be used in business, and that the surviving partner was bound to settle the affairs and pay the debts of the firm in the usual way, notwithstanding this clause.

The surviving partner carried on the business as before, and notified creditors and others dealing with him that his brother's capital remained in the business; he paid the greater part of the joint debts, and contracted new debts; he converted a part of the joint property into money, but less in value than the sum of the joint debts, and became bankrupt, having in his possession bank-stock and other specific assets standing in the name of the firm, without change, since the death of his brother, —

Held, that a joint creditor of the old firm, who had not received the notice above mentioned, could require that joint property remaining *in specie*, as it stood at the death of the deceased partner, should be applied to the payment of his debt in exclusion of the separate creditors of the bankrupt.

It seems, if the creditor had received the notice, it would not have affected his lien, unless he had done some act amounting to an election.

The fact that the surviving partner was executor and trustee of the deceased partner does not affect the rights of joint creditors, for equitable rights are not lost by the union or merger of different legal titles in one person; and, when bankruptcy occurs, the creditors may themselves assert the lien, which, while the surviving partner is solvent, is vested in the executor of the deceased partner.

THE petitioner asked to have the assets marshalled by the trustee appointed, and acting instead of an assignee, under sect. 43 of the bankrupt act. The parties agreed to the facts, which were substantially these: Samuel G. Clap and Edmund W. Clap were partners for many years under the firm of Clap & Brother, and during that time the petitioner lent them \$10,000, for which he held their firm notes. Samuel died in 1870; and Edmund carried on the business under the same name, until his bankruptcy in 1872, and used therein the assets of the old firm, of which several persons dealing with him, some of whom are now creditors,

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had notice ; but the petitioner had no such notice. Edmund had drawn out of the firm, at the time of his brother's death, a very large sum beyond what Samuel had drawn. Since that time he had paid the old debts beyond the specific joint assets then on hand, if his indebtedness to the firm is omitted from the computation ; but if that were counted in, he was still in arrears to the firm at the time of his bankruptcy. There then remained, and have come to the possession of his trustee, specific assets, consisting of bank-stock, real estate, &c., which was the property of the old firm. By his will, Samuel Clap, after giving to his wife certain chattels and a life-estate in his house, provided as follows: "3d. I give the residue, including the reversion of the house so given to my wife, of all the estate of which I shall be possessed at my decease, to my brother, Edmund W. Clap, for ever, in trust, for the uses hereinafter set forth," authorizing the trustee to sell, invest, &c. He then provides for a division of the income between his wife and his two daughters during their lives, giving large discretion to the trustee to advance money to the daughters out of the principal, in certain contingencies ; he appoints the same brother executor ; and, finally, 11th. "My brother is authorized to employ and use in his business the estate and property herein given him in trust, or any part thereof, before the same shall be required for distribution, charging himself with interest therefor at six per cent." The petitioner asked that an account be taken of the joint assets remaining at the time of the bankruptcy, and that the same be applied to the payment of his debt, before any part thereof should go to the separate debts of the bankrupt.

C. B. Goodrich, for the petitioner.

W. A. Field, for the respondents.

LOWELL, J. The petitioner asks that the trustee may be ordered to keep distinct accounts of the joint and separate estates, and that the proceeds of each may be appropriated to the corresponding class of debts. The bankrupt act, sect. 36, requires this to be done when partners are bankrupt, but does not, in so many words, refer to the bankruptcy of one partner only ; but there is no doubt that it applies generally to all settlements in bankruptcy, whether one or all the partners are before

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the court. Under a similar section in the insolvent law of Massachusetts, it was held that separate accounts ought to be kept whenever there were joint debts still outstanding, whether there remained joint assets or not, and whether one or more of the partners were before the court: *Barclay v. Phelps*, 4 Met. 397; *Howe v. Lawrence*, 9 Cush. 553; *Harmon v. Clark*, 13 Gray, 114; *Robb v. Mudge*, 14 id. 539. These cases, and others cited by the respondent for another purpose, which will be noticed presently, carry the doctrine to its utmost length, by deciding that, in the absence of positive fraud, the joint creditors have no claim on what was once specifically joint property, and has been converted into separate property by the agreement of the parties. I have expressed my doubt on former occasions whether some of these cases do not go too far; but I will not discuss them now, because they are not cases which concern a dissolution of the copartnership by the death of a partner. In such a case, the representatives of the deceased partner have a right to require the survivor to apply the joint property to pay the joint debts; and, if he becomes bankrupt, the joint creditors may insist that this shall be done: *Story*, Partn. § 361; *Lindley*, Partn. 577; *Evans v. Evans*, 9 Paige, 178; *Stocken v. Dawson*, 9 Beav. 239, affirmed 17 Law Jour. N. S. (Ch.) 282; *Tillinghast v. Champlin*, 4 R. I. 173. The supreme court has applied this equity in favor of joint creditors as against the United States, claiming a priority for a separate debt of one of the partners, and in favor of separate creditors as against joint creditors, under a trust deed which was ambiguous on its face, but dealt only with separate property: *United States v. Hack*, 8 Pet. 271; *Murrill v. Neill*, 8 How. 414.

Partnership debts being in equity joint and several, it has been held in some cases that, in the settlement of the estates of deceased persons, all creditors come in equally against the separate assets. Such was formerly the law of Massachusetts, when estates of deceased persons were insolvent: *Sparhawk v. Russell*, 10 Met. 305. But a statute has changed the rule in that State, and the same mode of marshalling applies, whether the insolvent is dead or living: Gen. Stats. ch. 99, § 18; *Rice's Case*, 7 Allen, 112. I am not aware that it ever was held that the separate creditors could claim against joint assets, until the joint cred-

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itors were satisfied. The superior position of the joint creditors was founded on the higher nature of their security, being several as well as joint. See the able note of the American editors to *Silk v. Prime*, 2 Lead. Cas. in Eq. 82. So that, even when the law of Massachusetts permitted the joint creditors an equal share of separate assets, I suppose a court of equity would have given the surviving partner a prior right to joint assets. But however this may be, it has always been the rule in equity, when a living person was bankrupt, that the assets should be marshalled.

The respondent, not denying the general proposition, insists that this case does not come within it; because the late Samuel G. Clap has, by his will, relinquished the lien, and that the bankrupt has so dealt with the property as to convert it into his separate estate. The cases cited establish the doctrine already referred to, that where partners, acting in good faith, whether before or after the dissolution of the firm, convert the joint into separate property, in whole or in part, the creditors are bound by that action; because their lien depends on that of the partner himself, and, if he has in good faith relinquished it, they cannot revive it. Whatever was done here is admitted to have been done in good faith; and there is no intimation even of a knowledge of insolvency on the part of the present bankrupt, at any time before he filed his petition, so that, if these cases apply, he comes within them. But I do not read the will as making any such severance. The residue is given to the surviving partner upon certain trusts, and he is authorized to use, in his business, "the estate and property herein given him in trust, or any part thereof, before the same shall be required for distribution." This language is broad enough, perhaps, to include the whole property; because he held it all in trust, either as executor or trustee; but, in the connection in which it is found, it clearly means the trust fund, as I believe both parties concede. The residue, which is to constitute the trust fund, cannot be ascertained until debts as well as legacies are paid. I can find nothing in the will that contemplates a continuance of the business in the old name, nor any gift of the whole joint estate to Edmund, in order that he might continue it; nothing, in short, that binds

the testator legally or equitably for new debts, or relinquishes the right of his representatives to insist that the old debts shall be paid, and the business of the firm shall be wound up in the usual way. If, by the will, the surviving partner is possessed of the whole estate, in one capacity or another, still his duty is the same in either: *Wedderburn v. Wedderburn*, 4 Mylne & C. 41. Equity never permits equitable rights to be lost by the merger or union of different legal titles in one person; and, when bankruptcy occurs, the joint creditors may assert the lien which before that time was vested in the executor of the deceased partner. It may be that there is a stronger legal hold upon him to do as executor what he would be bound to do as surviving partner; I mean to say, a remedy for a breach of duty may be simpler, but the duty is the same, to wind up the business, pay the joint debts from the joint assets, and dispose of the testator's share, as required by his will. If he had, in fact, converted all the joint assets into money, and paid it away, the lien might have been lost; but he has not done so. The case finds that there are specific assets, consisting largely of bank-stock, remaining in his hands, in the same condition that they were in at his brother's death; and the lien, certainly, has not been displaced from these.

Nor can the fact that he retained Samuel's property, and did business thereon, and so notified some of his creditors, affect the rights of the petitioner, who was not notified. Indeed, it is very doubtful whether notice would make any difference: *Newsom v. Coles*, 2 Campb. 617. It being found that this action was not in accordance with the will, nothing but a legal or equitable estoppel can change the rights of the parties. The rule that chattels and personal property, left in the order and disposition of a bankrupt by the consent of the true owner, are to be held for his debts, has never had a place in the more recent bankrupt and insolvent laws of this country, and certainly has none in our present law. And even in England a surviving or remaining partner does not hold the joint assets in his order and disposition in this sense, unless the other partner was dormant, or unless there was an express agreement to that effect, because he holds in trust to pay the joint creditors: Collyer on

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Partnership, § 883 ; and, *a fortiori*, if he holds under a will which is notice to all the world. This case, in its present aspect, does not bring up the whole account for settlement ; and I do not know precisely what proportion of the joint assets have been converted. If it should turn out that there is any balance due the bankrupt on the final adjustment, no doubt that will go to his separate creditors. In the absence of fraud or preference, I cannot review the acts of the surviving partner in paying either joint or separate debts, both of which I suppose he continued to pay until he found he must suspend. I understand that proceedings will be taken by the representative of Samuel Clap to settle the partnership account, and I do not now decide whether any balance which would be otherwise due that estate will be affected with any equity in favor of Edmund's creditors, by reason of the permission to use the trust fund in business. *Petition granted.*

JAMES OAKES v. THADDEUS RICHARDSON.

SEPTEMBER, 1872.

The admiralty has jurisdiction of a personal action by a charterer against the owner of a vessel for damages, in not proceeding to the port of loading. The jurisdiction does not depend upon the fact of the cargo, or some part of it, having been put on board the vessel.

It seems an action *in rem* would lie in such a case.

The measure of damages in such an action is, usually, the increased freight and charges, if any, which the charterer has been obliged to pay in order to have his goods carried.

The cases in which loss of profit on the goods have been allowed in damages are exceptional.

Interest allowed from the date of demand, upon evidence that the delay in proceeding was granted at the defendant's request.

AFFREIGHTMENT. — The libel propounded that Oakes and Richardson entered into a charter-party at Boston 19th September, 1868, by which the latter, as part owner and agent of the brig Goodwin, then on a voyage to Lisbon, chartered her to the libellant for a voyage from Cadiz, in Spain, to Gloucester or Boston, Massachusetts, to carry a full cargo of salt, in bulk, at a freight of seventeen cents for each bushel, measured out at the port of

delivery ; that he covenanted to receive the cargo on board, and safely deliver it, &c. ; and that the parties bound themselves to each other in the penal sum of \$3,000 ; that the defendant had broken his covenants, the vessel never having begun the voyage ; and the libellant demanded the penalty. A copy of the charter-party was annexed to the libel. It contained this stipulation : " It is also agreed that the funds of the brig shall be used to pay for the cargo at Cadiz, and that, on the receipt of the invoice, Mr. Oakes shall pay the same in United States currency, with an additional amount sufficient to convert the same into American gold coin." He was also to pay interest, insurance, and wharfage.

The answer admitted the execution of the charter-party. It denied the jurisdiction of the court, and alleged that, after the contract was made, the parties agreed that if the master of the brig should not assent to the charter-party, it was to be void, and that the master did not, assent ; that the libellant did not provide a cargo at Cadiz, and did not furnish the master with funds, except by directing him to draw on the libellant, which he was not bound to do ; and that the brig had no funds. It denied all damage.

There was evidence tending to show that the libellant had been in the salt trade with Cadiz for above forty years, and had a correspondent there who had agreed to furnish a cargo for this voyage at a certain price ; that the libellant wrote to the master at Lisbon, communicating the terms of the charter, and directing him, in case the funds of the brig were insufficient, to draw on the libellant for the balance. One of the parties sent the charter-party to the master at Lisbon. In his deposition, in answer to a question, what he did about the charter-party, he said : " Well, I weighed the contents in my mind, in the first place. I abandoned it. I would not accept of it. I notified Mr. Thaddeus Richardson to that effect soon after I received the charter-party, perhaps a week after." The respondent received such a letter from the master, and notified the libellant, in writing, that the master declined to accept the charter. The parties afterwards met, and the respondent testified that he told the libellant, that, if it was a great disappointment, he would try

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to obtain him another vessel. An agent of the respondent testified to a similar conversation; and they both said that the answer of the libellant was, that he cared nothing about it. The libellant denied having had any such conversation with either witness.

The libellant's evidence on the subject of damages tended to show that the season for selling salt of this kind was through the winter and early spring, before the fishermen began their voyages; that, if he had had this cargo at any time during the season of 1868-69, he should have made a profit of about \$1.25 on each hoghead; that vessels were difficult to obtain for this business; and that he tried to charter them, not only to bring this cargo, but for his trade generally, and succeeded in obtaining only one ship, for which he paid a freight of twenty-five cents a bushel. It was agreed that the carrying capacity of the brig Goodwin was one thousand eight hundred and forty-seven hogsheads, or fourteen thousand seven hundred and seventy-six bushels of salt.

S. Wells, for the respondent. 1. The admiralty has no jurisdiction of a contract of affreightment, unless the goods have been actually shipped: *Rich v. Parrott*, 1 Cliff. 61; *Clarke v. Crabtree*, 2 Curtis, C. C. 87; *Cutler v. Rae*, 7 How. 729; *The Tribune*, 3 Sumner, 144.

2. The agreement to furnish funds was conditioned on the brig's having them; and the libellant should have been prepared to furnish them in the contingency which happened. He could not require the master to become responsible as drawer of a bill.

3. The measure of damages is the difference in freight which the libellant would be obliged to pay to bring his salt to Gloucester or Boston, as to which there is no sufficient evidence.

J. C. Dodge, for the libellant. 1. At the present day, there can be no doubt of the jurisdiction of the district court in admiralty over damages for breach of a charter-party. The doubts that were expressed at one time have all been done away by the late decisions.

2. The stipulation that the brig should furnish funds was not conditional, but an absolute engagement that there should be funds forthcoming; and the libellant was not bound to do even as much as he did in authorizing a draft.

3. The damages would often be the difference in freight ; but, when other vessels cannot be obtained, it is the profit that might have been made on the goods : Sedgwick, *Damages* (2d ed.), 355-357 ; *Brackett v. McNair*, 14 Johns. 170 ; *Amory v. McGreggor*, 15 id. 24 ; *O'Conner v. Foster*, 10 Watts, 418 ; *Bell v. Cunningham*, 3 Pet. 69 ; *The Cassius*, 2 Story, 81.

LOWELL, J. Since the decision in *New Jersey S. N. Co. v. Merchants' Bank*, 6 How. 344, it has not been doubted that the courts of admiralty of the United States have jurisdiction of a contract of affreightment ; and this is now true of all voyages on the great lakes and other navigable waters of the country, as well as on the high seas : *The Belfast*, 7 Wall. 624 ; *The Eddy*, 5 id. 481 ; *The Harriman*, 9 id. 161. The respondent contends that the jurisdiction does not attach until the goods have been shipped. The opinion in *Rich v. Parrott*, which he cites, contains no more than the intimation of a doubt created by some then recent remarks in *Schooner Freeman v. Buckingham*, 18 How. 182, and *Vandewater v. Mills*, 19 id. 82. In the former of these cases, there is a *dictum* (p. 188) that the law creates no lien on a vessel as security for the performance of a contract to deliver cargo, until some lawful contract of affreightment is made, and a cargo is shipped under it. And, in the latter case, that remark is quoted and called a decision of the court ; and a like rule concerning the privilege against vessels is cited from *Boulay Paty* (19 How. 91). But I do not understand the point to be decided in either of those cases ; because, in the one, the controlling consideration was that no valid contract of affreightment had been made, the master having signed a bill of lading for goods that had never been put on board his vessel, a fact which went quite beyond any question of lien ; and in the other case, the contract was held to be one of partnership, and not of affreightment, and for that reason to be out of the sphere of the admiralty.

In a case which was ably argued and carefully considered, Mr. Justice Nelson enforced a lien against a steamer for breach of a contract with a passenger, though the voyage had not been begun, and the libellant had not actually gone on board before suit brought : *The Pacific*, 1 Blatch. C. C. 569. So did Judge Betts

in respect to precisely such a contract and such a breach as are now in judgment, excepting that the proposed voyage was only from New York to Brooklyn: *The Flash*, Abb. Adm. 67. After stating the general rule, that the ship is bound by such an undertaking, the learned judge proceeds: "This principle does not require, as was contended by the counsel upon the argument, that the goods should be actually on board the vessel to raise the lien." And he gives some sound reasons for this opinion.

No doubt, liens or privileges in the admiralty may often exist when the law of agency would not hold the principal to be bound. The master can impress liens on the vessel by acts and neglects which do not bind the owners; as where he is appointed by a special owner, or even where he is not lawfully master at all. There may be cases in which a vessel will be bound for salvage, collision, bottomry, and, I think, for many other things, in which no person excepting the master can be sued in any court; and it follows from this, that, until some service has been begun, there will be no privilege against the vessel under such circumstances. But this case, being a personal one, does not raise any question of lien. The notion that the admiralty has no jurisdiction independently of lien, no power to give damages in a personal action for breach of a maritime contract, has been long since exploded in this country. The case cited from 3 Sumner contains only a reference to *Andrews v. Essex F. & M. Ins. Co.*, 3 Mason, 6, in which it was held that a mere preliminary contract, looking to a maritime contract, is not itself maritime and cognizable in the admiralty; as, for instance, an agreement to give a policy of insurance in a certain form. In other words, a court of admiralty, though it acts on equitable principles, has not the power of a court of equity to enforce specific performance. When the agreements are executory in that sense, as being incomplete, this court cannot deal with them; but when the contract has been fully made, and is a maritime contract, it has not been held in this country, within the last twenty-five years, that the only remedy for a breach of it is in a court of common law. That the admiralty has jurisdiction of charter-parties, and that it may give a remedy for a breach of such contracts, are identical propositions.

I do not find that this contract was to be void if the master refused to accept it. Some admissions of the libellant were testified to ; but they are opposed to the charter-party itself, and cannot be received to control it. Nor do I consider it proved that the respondent offered to find another vessel as a substitute for the brig ; and that the libellant, understanding the offer, refused it. The libellant denies it ; and the conduct of the parties confirms the denial. If such an offer was made and refused, it is very doubtful whether it would estop the libellant from recovering damages : *Higginson v. Weld*, 14 Gray, 165. It is plain that the respondent had no other vessel to offer ; and whatever was said can hardly have amounted to more than some suggestion or proposition of an equivocal character, that made no impression on the libellant's mind.

Upon the true measure of damages, the difference between the parties is rather of fact than law. This is not an action for misfeasance or delay in transporting a cargo, or damages for its loss. In such cases, where a carrier has once taken possession of the goods, he may often be liable for the net market price, at the port of delivery, at the time when the goods would have arrived but for the fault of the carrier ; or for a diminution in market value : *Cutting v. Grand Trunk R. Co.*, 13 Allen, 381 ; *The Boston*, 1 Lowell, 464. But the damages for refusing to receive a cargo are the necessary expenses to which the refusal has subjected the shipper, which are usually the increased rate of freight, if any, and often some incidental charges : *The Tribune*, 3 Sumner, 144 ; *The Zenobia*, Abb. Adm. 80 ; *Crouch v. Great Northern R. Co.*, 11 Exch. 742 ; *Ogden v. Marshall*, 4 Selden (8 N. Y.), 340 ; *Porter v. The Steamboat New England*, 17 Mo. 290. The cases cited by the libellant hold that, if it is impossible to obtain other carriage for the goods, the loss of a probable profit may be recovered ; but they are exceptional, and are so explained by Grier, J., in charging the jury in the suit in 10 Watts. Therefore, I say the parties differ only on the question of fact whether other vessels could have been obtained to bring this cargo. It appears that the libellant did charter one vessel during the season, and that he made some effort to charter others. This is all that is proved with any degree of definiteness. It seems

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probable that ship-brokers might have given further information as to the state of the market for freights. It appeared incidentally from one of the defendant's witnesses that ships were difficult to obtain at that time; and there was evidence that some vessels had been chartered during the season, but before the breach of this contract, for sixteen cents, and so on up to seventeen cents, a bushel. After the breach, it was the duty of the charterer, if he wished to claim damages of the respondent, to obtain a freight as low as he reasonably might; and, whether he made any such exertions or not, the damages would be measured by what he might have done in that respect. I do not doubt that Mr. Oakes chartered the ship in December as low as he could; but whether, in November, he could have done any better, or whether there may have been other vessels at any time during the season ready to serve at more reasonable rates, I do not know. Taking the evidence as given, I must award the difference between seventeen and twenty-five cents a bushel. When the damages are unliquidated, whether the form of the action be tort or contract, the allowance of interest is within the discretion of the court or jury. Here the libellant in June, 1869, made a demand on the respondent for damages at one dollar per hogshead, though he considered the loss to be more than that. The preponderance of testimony seems to me to be, that the delay in prosecuting the case, after this bill was rendered, was occasioned by a request of the respondent that the libellant would wait until the brig should come to Massachusetts; so that the damages, if any, should fall equally on all interests, without raising any question of contribution, or requiring another action between the owners themselves. Under these circumstances, it seems to be just that interest should be charged from a reasonable time after the demand. I accordingly award to the libellant damages for the breach of the charter-party, as follows:—

Cost of freight beyond that agreed on, 14,776 bushels at 8 cents,	\$1,182.08
Interest three years and four months	236.41
	<hr/> \$1,418.49

and costs of suit.

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Re IRA HAY & AL.

OCTOBER, 1872.

The assignee in bankruptcy may designate a sum of money as "necessaries," under sect. 14 of the statute.

LOWELL, J. The question presented in this case is, whether the assignee has power to allow the bankrupt any part of a sum of money which was in the possession of the latter as his separate property when the joint petition was filed. Sect. 14 excepts from the operation of the assignment the necessary household and kitchen furniture, and such other articles and necessities of such bankrupt as the assignee shall designate and set apart; having reference in the amount to the family, condition, and circumstances of the bankrupt, but altogether not to exceed in value, in any case, the sum of \$500, &c. In *Thornton's Case*, 2 N. B. R. 189, arising in the Cape Fear District of North Carolina, it was held that money might be set apart. Brooks, J., considered the purpose of the law to be to furnish temporary support to honest bankrupts, whose property had been all surrendered to their assignee; and that this object would be defeated in some most meritorious cases, if money could not be considered a necessary. In two other cases the contrary has been held, on the ground, as I understand, that "articles and necessities" must be taken to refer to things *ejusdem generis* with household and kitchen furniture, such as fuel and provisions: *Re Lawson*, 2 N. B. R. 54; *Re Welch*, 5 id. 348.

I am of opinion that a fair construction of the act may include money as necessities, for the reasons given by Judge Brooks. The law intends to encourage a full disclosure and surrender of all property, and to provide for the immediate wants of the bankrupt, whether he happens to be a householder or not; and that an insolvent should by accident or design have acquired a full stock of necessary furniture, fuel, provisions, and the like, should put him in no better situation than one, with equal needs, who has not had equal foresight or good fortune. Considering the intent of the statute, I am of opinion that money necessary for the support of the bankrupt is within its terms. Under a statute giving

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the admiralty court jurisdiction of suits for necessities supplied to a foreign ship, money lent to the master to buy necessary supplies has been held within the law, not by subrogation, but as being described by the language: *The Sophie*, 1 W. Rob. 368; *The Onni*, Lush. 154. True, the assignee cannot see that the money is applied to the purchase of necessities; but in case of the need which the law supposes will be proved to him to exist, and which it refers to in speaking of the condition and circumstances of the bankrupt, it may be presumed that the sum supplied will go to his use and that of his family.

The most decisive authority remains to be cited. The bankrupt act of 1841, sect. 3, was identical with the act of 1867, so far as this case is concerned, the one being literally copied from the other; and Mr. Justice Story decided that the assignee could set apart a sum of money to a bankrupt, wherewith to pay his board and that of his family: *Re Grant*, 2 Story, 315. He further held that the court could not make the allowance in the first instance, for that it was wholly within the authority of the assignee; subject, of course, to an appeal to the court, though the learned judge does not mention that, but it is provided for in that statute as in this.

I give no opinion whether the condition and circumstances of the bankrupt in this case will require the assignee to set apart any, and if any what, sum of money; but decide that this matter must first be determined by him, subject to my final decision if his determination should be excepted to.

I do not mean to say that this question of fact and discretion might not be submitted to the court by consent of both parties; but I do not understand it to have been so submitted in this case.

Ordered: that the assignee may designate and set apart to the bankrupt, N. C. Stowe, such sum, not exceeding \$500, if any, as he shall find to be necessary, under sect. 14 of the bankrupt act; subject to exceptions and the final determination of the court, as provided by said section.

NOTE. — The assignee refused to make an allowance to this bankrupt or either of his partners; and, upon appeal from this decision, there was evidence tending to show that each of the bankrupts had earned something since the bankruptcy, and two of them had no family dependent on their exertions, and were skilled workmen in their

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business of boot and shoe manufacturers; that the wife of the third had some little property; that the assets were small compared with the debts, the case presenting the appearance of a consumption of the capital for the personal expenses of the partners. The judge sustained the action of the assignee.

In a case brought up a few days later (*Re Steele*), the testimony was that the bankrupt and his family had suffered much from illness about the time of the bankruptcy; that much of their clothing and bedding had been destroyed for fear of infection; that a settlement would probably have been made with the creditors, if the negotiations had not been broken off by the illness of the debtor. He was an old man, and his assets were considerable. An allowance of money was ordered.

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OCTOBER, 1872.

Sect. 26 of the bankrupt act authorizes the examination of the bankrupt and of any one who is believed to have important information touching the estate, trade, or dealings of the bankrupt, which may aid the assignee in the execution of his trust.

It seems that the bankrupt, since the passage of the act of 25th February, 1868, 15 Stats. 37, could not refuse to testify on the ground that his answers might criminate him in the federal courts; but the privilege of communication between client and solicitor or counsel extends to bankrupts and their legal advisers.

A person who is examined under sect. 26 is to disclose all matters touching the trade, &c., of the bankrupt; but is entitled to the usual privileges and exemptions.

Letters written by one partner to another concerning a lawsuit, which the partners expect to begin, and do presently after begin, are privileged.

So are letters which concern only the case of the party writing the letters, and have no relation to the title or position in the litigation of the interrogating party.

LOWELL, J. That part of sect. 26 which relates to the examination of witnesses is very brief, and might seem to be intended only to give the bankrupt court power to obtain evidence in actual trials pending before it. But when it was considered that the first section of the statute had already conferred this power by necessary implication in establishing the court and defining its general powers and jurisdiction, and when the subject-matter of the section was seen to be an examination into the trade and dealings, &c., of the bankrupt, the courts have uniformly arrived at the conclusion, that a general examination, without any definite suit or issue pending, was intended to be included: *Re Blake*, 2 N. B. R. 10; *Re Feinburg*, id. 425; *Re Fay*, 3 id. 660; *Re Lath-*

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rop, 4 id. (4°) 93. It will be found that systems of bankruptcy have usually made provision for such investigations. Thus the act of 5 Geo. II. ch. 30, § 16, passed in 1732, was remarkably like our sect. 26. It provided that the commissioners might examine, as well by word of mouth as by interrogatories, every bankrupt, touching all matters relating to his trade, dealings, estate, and effects; and might also "examine, in manner aforesaid, all and every other person duly summoned before, or present at, any meeting of the said commissioners, or the major part of them, touching all matters relating to the trade, dealings, estate, and effects of every such bankrupt." In 1 Christian, Bankrupt Law (2d ed.) 375, the learned writer says of these examinations: "The object in general is to compel a discovery by a confession of the party, which in every court will be evidence against himself." In later statutes, the power has generally been defined somewhat differently; but the main object and use of it have been similar. Thus the statute of Massachusetts, 1846, ch. 168, § 1 (now codified in Gen. Sts. ch. 118, § 107), and like statutes in England, authorize the courts of bankruptcy and insolvency to summon and examine persons suspected of having property of the bankrupt. In deciding a case upon the statute of 1846, Shaw, C. J., uses almost identical language with that I have quoted from Mr. Christian: "The purpose of the statute seems to be, by a thorough investigation of the case and an appeal to the conscience of the party suspected, to enable the assignees to judge whether they will proceed to claim such property for the general creditors, and to obtain evidence to aid them in prosecuting such claim:" *Harlow v. Tufts*, 4 Cush. 448, 453. This being the purpose of the law, I have thought proper, as matter of practice, in order to guard against vexatious and oppressive examinations, to require a brief statement to be made on oath by the assignee or creditor applying for the summons, showing the subject-matter upon which he wishes to examine, and some ground to believe that the witness has information which would benefit the general creditors. It is not necessary that the witness should be himself suspected of having any estate or effects of the bankrupt, because our statute is not limited to that; but most witnesses will be found to be persons so suspected, or persons in complicity with them, because the

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examination is of no value as evidence, excepting against the witnesses themselves.

These examinations, then, stand in effect on the footing of summary bills of discovery; and, in my opinion, they should be subject to those rules of evidence which the courts have found to be just and necessary in cases of discovery in equity, and at law when courts of law have equity powers; and I have consulted the decisions in that class of cases as well as those in bankruptcy. The discovery cannot be limited by reference to an action pending, for there is no such limitation in the law; but it is to be confined to the subject-matter, the trade, dealings, estate, of the bankrupt: *Ex parte Legge*, 17 Jur. 415, per Coleridge, J. The right of the assignees, then, as I consider it, extends to a discovery of all such matters as may throw light upon the estate of the bankrupt, including the debts owed him and conveyances and payments made by him, which are supposed to be voidable by his assignees whether on the ground of preference or any other.

In the examination of witnesses or parties, whether in the way of discovery or otherwise, there are certain questions which they may refuse to answer; the two principal grounds of demurrer being that the answer may tend to criminate the witness, and that the conversation or document called for is privileged. The former objection is perhaps no longer available to bankrupts, so far as relates to crimes against the bankrupt law or other crimes cognizable by the federal courts, since the statute of Feb. 25, 1868, 15 Stats. 87, which was probably intended to meet their case, and which provides that no answer or other pleading, and no discovery or evidence obtained by means of any judicial proceeding, shall be given in evidence, or used in any manner against the party or witness, or his property or estate, in any criminal or penal proceeding in the courts of the United States. But the objection that the communication is privileged is the one which this case raises.

The right which every person, whatever his character or standing, has to consult freely with his legal adviser, is one which, where criminal trials are concerned, it is not too much to call a sacred one; and in civil matters it is a most important right, with-

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out which the usefulness of the solicitor and advocate must be seriously diminished. So far from curtailing this privilege, I believe the law would do well to extend it to some other professional persons. It has been ruled that the solicitor of a bankrupt is an exception; because the privilege being that of the client, and the bankrupt being bound to disclose every thing, the solicitor must do likewise: *Re Elliott*, Fonbl. B. R. 74. This ruling appears to me to be founded on a misapprehension. Undoubtedly, a bankrupt is bound to disclose the whole truth concerning his property, dealings, &c., and to surrender all his books, contracts, &c., to his assignee; equally true is it that every witness, whether a party in interest or not, is bound to disclose the whole truth concerning the matter under inquiry: but the whole truth does not include confidential communications between client and solicitor, or client and counsel, which are admissions made under the seal of authorized secrecy.

In this case it appears that the bankrupts, in February, 1871, made an executory contract with the witness and his partner, composing the firm of Holt & Co., to sell them certain timber, to be delivered at the bankrupts' mill in the State of Illinois. About the time the bankrupts stopped payment, a shipment of timber was made from the mill to the port of Boston: and this timber was taken by Skillings & Co., as belonging to them by virtue of some pledge from the bankrupts; but the witness and his partner considered that it belonged to them, and took it from Skillings & Co., by a writ of replevin; and the suit is still pending in the courts of the State. I understand that, if Holt & Co. prevail in that suit, the assignees intend to claim the timber as assets of the bankrupts: and that, besides, they are interested in favor of the title of Skillings & Co., because there will be a balance left for the general creditors, after the pledge has been redeemed from them; whereas, if Holt & Co.'s title is good, it takes the whole. Under these circumstances, it is proper that the assignees should examine the witness concerning the delivery of the timber; and the only remaining question is, whether the letters, all of which are written by one partner to his co-partner, are privileged. It seems that Holt was at the mill of the bankrupts in Illinois when the replevin suit was brought; and the other part-

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ner, the present witness, swears he was there to obtain evidence in support of their claim, that the timber had been fully delivered to them under the terms of the contract. By consent of counsel I have looked at the letters; and two of them, dated respectively June 20 and 22, 1871, are clearly within the privilege, because they are narratives of interviews between the witness and his legal advisers. The other letters, which are statements, advice, &c., from one partner to the other, in relation to the dispute between them and Skillings, present a question of some difficulty, upon which the decisions cannot be fully reconciled. In *Kerr on Discovery*, pp. 144, 146, the cases are referred to; and the discrepancy in them is well illustrated by the inconsistent statements of the learned author, who, following faithfully the decisions, says on p. 144, "No privilege attaches to communications, however confidential they may be, passing between a party and his agent, even after the dispute may have arisen, and in contemplation of litigation, unless they have been made to the agent, either by the party, for the purpose of being communicated to his legal adviser in his professional capacity, or by the legal adviser, for the purpose of being communicated to the party." And on p. 145, "Communications, however, with an unprofessional lay agent, in anticipation of litigation, and with a view to the prosecution of a claim or a defence to a claim, are protected from production. Information procured through an agent relative to litigation, and with a view to it, is as much protected on principle as if it were procured through a solicitor; for it is in reality the litigant party who conducts the litigation, though he conducts it through a solicitor." Here we find a most distinct announcement, in the first quotation, that communications are not protected, unless they come through the solicitor; and in the other, one fully as explicit that the interposition of the solicitor is of no consequence. I suppose the learned author did not feel called upon to reconcile this conflict, or to do more than reflect the light thrown on his subject by the cases cited, however its color might vary at different moments. It seems to me, however, that the doctrine of p. 145 is the true one, besides conforming to the latest cases. See *Gibbs v. Ross*, L. R. 8 Eq. 522; *Cossey v. London, &c. Ry. Co.*, L. R. 5 C. P. 146; *Chartered Bank of*

Re The Independent Insurance Company. — Ex parte Nickerson.

India v. Rich, 4 Best & S. 73. This is a sound application of the rule, that the privilege of the solicitor rests on that of his client. I have no fault to find with those cases which require the production of reports of agents, made in the ordinary course of their duty, before litigation, and which, therefore, stand like *res gestæ*: *Wooley v. North Lond. Ry. Co.*, L. R. 4 C. P. 602; *Mahony v. Widows' Assur. Fund*, L. R. 6 C. P. 252; but when a lawsuit is begun, or is imminent, the parties to it ought to be at liberty to consult with each other, and with agents, without the necessity of producing the correspondence, at the call of the opposing party.

There is another sufficient ground for excluding these letters, that they relate to the case of Holt & Co., exclusively. It has always been the rule in equity, and has been adopted at common law in England and Massachusetts, that all which any party to the litigation is bound to discover is what relates to his opponent's case. Thus the cases in which the reports of agents have been required to be disclosed were reports of interviews with the party interrogating, or of the facts attending the injury to him, and matters tending to establish his side of the controversy. But these letters were written concerning the witness's own case exclusively, and have no reference to the title or evidence of Skillings & Co. They might possibly tend, if produced, to show defects in the witness's case, but none to show any strength in that of his opponent. For both these reasons, I decide that the witness is not bound to produce these letters for inspection by the assignees.

Order accordingly.

Re THE INDEPENDENT INSURANCE COMPANY. — Ex parte NICKERSON.

NOVEMBER, 1872.

A claim founded upon a covenant to repay part of a premium paid for a policy of insurance, issued by a stock company upon cancellation of the policy, is provable in bankruptcy, in the absence of provisions in the State laws, the charter or the by-laws of the company, which would make it void.

The actual insolvency of the company before bankruptcy does not discharge such a covenant, or render its performance illegal.

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The surrender of the policy in accordance with the covenant cannot be a preference of the assured.

It seems that, if the interests of the estate require it, debts may be admitted to proof without affidavit, if no creditor objects; also, that several debts may be admitted upon one affidavit.

PETITION by a creditor of the Independent Insurance Company to expunge the proof of debt made by the firm of C. F. Hovey & Co., of Boston. The case as stated by the parties and certified by the register was: that in August, 1870, C. F. Hovey & Co. procured of the insurance company a policy on goods, in their place of business in Boston, to run for four years, and paid down a premium of \$300. The policy contained this clause: "And the said company further covenants and agrees, that, in case there has been no loss, this insurance may at any time be terminated at the request of the insured, and upon the surrender of the policy; in which case this company will retain the customary short-time rates for each month entered upon, during the period such policy has been in force. This insurance may also be terminated at any time, at the option of this company, by giving five days' notice, in writing, to the insured, their agent or attorney; in which case this company will refund, on demand, on the surrender of this policy, a ratable proportion of premium for unexpired term."

The insurance company was made insolvent by the fire in Chicago, which took place October 8 and 9, 1871. On the tenth day of that month, the president wrote to the secretary not to make any payments, of any kind, out of the funds of the company, except for the necessary expenses of conducting the office. On the next day, one of the firm of C. F. Hovey & Co. wrote on the back of their policy, "Boston, Oct. 11, 1871. Cancelled this day by agreement," and signed it in the name of the firm; and on the same day the policy, with this indorsement, was sent by the insured to the office of the company, where it was received by the secretary, and retained in his possession until after the bankruptcy of the corporation, which was adjudged in April, 1872, on a creditor's petition, filed Jan. 9, 1872. The proof that was made by the insured, for the amount which would be due them as returned premium under the clause of the policy above recited, was the subject of this petition.

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J. O. Teele, for the motion.

B. Sanford, for the insured.

LOWELL, J. It is said that a very great number of claimants, whose debts are each trifling, stand ready to prove them against the assets in this case, if it shall be decided that this proof was well made; and that the mere cost of proving, if assessed on the fund under a construction of rule 30 of the supreme court, which some persons contend for, will amount to thousands of dollars (more than twenty thousand dollars), if all such creditors should prove their debts, making a most serious and intolerable diminution of the assets. This rule is said to allow for affidavits in proof of debts, the price chargeable for examinations, and to make those charges a lien on the fund. I doubt whether the rule is intended to apply to the ordinary affidavit in proof of debts, which, although in some parts of the law called a deposition, resembles rather an affidavit than an examination or deposition such as the rule contemplates. But if the charges, whether greater or less, are necessarily incurred in proving debts of a dollar or of a very few dollars, it is evident that the creditors will forego their proofs, unless the costs are a charge on the fund; and, if they are a charge, it will be very burdensome, however small each fee may be. This is a very unfortunate state of things, arising out of the system of payment by fees. It seems to me that the assignees may avoid the dilemma, by admitting such debts to proof without the affidavit. If no creditor objected, such a course of proceeding would be supported on the ground, that, in matters of merely private right, a court may waive points of form, even when prescribed by statute, if all parties interested agree. I lay no claim to a power to set aside the statute or the rules: but I do say that both must be construed, if possible, so as to work out their true intent; and that particular rules of evidence, especially the right to have all evidence given on oath, may always be waived by the parties, and are constantly waived in all the courts of law and equity. Another course would be to admit all these debts under one affidavit, or a few affidavits, of the officers of the company, who are as well acquainted with the facts as the several persons insured. This has been done, as I am informed, in a case before one of the

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registers, Mr. Thorndike, whose experience (part of which was acquired in an office which he held under the insolvent law of Massachusetts) has been very great. Doubtless, a way may be found, and must be found, if possible, to prevent the expenses of administration from being an intolerable burden on the assets, or on the several creditors.

The debt offered for proof in this case is large enough to take it out of any such list as is above referred to ; and must be allowed, if it is found to be a provable debt, whatever may be the consequences to other persons. I understand the main objection to be, that the premium which was paid for four years in advance formed part of a fund which is in some way pledged or devoted to the payment of losses. No decisions were cited for this position. That there are many cases holding such a doctrine in regard to the notes given to mutual insurance companies as a guarantee, I am well aware ; but those were cases where, by the charters of the companies, or by the law under which they were organized, or by express contract, such notes formed a sort of capital for the security of losses: *Brouwer v. Appleby*, 1 Sandf. 158 ; *Hone v. Allen*, id. 171, note ; *Deraismes v. Merchants' M. Ins. Co.*, 1 Coms. 371 ; *White v. Haight*, 16 N. Y. 310 ; *Maine Mut. Ins. Co. v. Swanton*, 49 Maine, 448. These are a few of the decisions. There are others in many courts ; but I know of none that hold stock companies to any such rule. The deposit notes, or whatever else they may be called, of mutual companies, represent stock ; and are liable to assessment, in whole or in part, under the rules and by-laws by virtue of which they are given : but I have found nothing in the charter of the Independent Insurance Company, nor in the general laws of Massachusetts regulating stock companies, which impresses any such character upon notes or payments given to such a company for premiums to be earned in the future. No by-law of the company was invoked to aid the petition ; and I suppose none such exists. The money was paid in accordance with the terms of the policy, one of which was that a part should be repaid if the assured should at any time elect to cancel their policy. If such a stipulation had not been made, it is impossible to say, judicially, that the money would ever have been advanced.

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I see no good reason to say that the actual insolvency of the company, before bankruptcy, would discharge this covenant, or render its performance illegal. No evidence has been given even that the cancellation of the policy would work any injury to the other policy holders. It may well be that a cancellation of all the policies on which no loss had been suffered would be advantageous. It would certainly have the effect to fix the exact liabilities of the company, and might be a prudent measure. I do not know how many policies in this company were cancelled, nor when or by whom. Upon those not cancelled the assets would remain liable for losses, until the final dividend shall be declared. A mutual insurance company that had become insolvent, and had been enjoined from continuing its business, cancelled all its outstanding policies, in virtue of a by-law much resembling the stipulation in this contract, and with the consent of the supreme court of Massachusetts, before whom the case was pending; and the court afterwards held that the return premiums were just debts to be paid out of the deposit notes: *Fayette Mut. Fire Ins. Co. v. Fuller*, 8 Allen, 27. But, apart from that consideration, there is no possible ground, that I can perceive, for saying that the surrender of a policy by the assured, in accordance with his contract, was intended to be, or was or could be, a preference of the assured over the other creditors, when its only effect is to put him on the same footing with other creditors. If a note is payable, or any duty is to be performed, on demand, I know of nothing in the bankrupt law which prohibits a demand being made after insolvency, in order to fix the rights of the parties, whether in the payment of interest or any thing else. It was an act which the assured had a right to do, with or without good reason, whenever they pleased.

Some question was made upon the construction of the policy, and whether the assured had brought themselves within its terms. It is clear that the stipulation, that the company will retain a certain part of the premium in case of the surrender of the policy, implies by necessary intendment that they will return the remainder; and there is no more doubt that the surrender by the assured needs no acceptance by the company to give it full effect. When the memorandum was indorsed upon the

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policy, and they were received and retained by the company, without objection as to form, the surrender was complete, and the rights of the parties were fixed.

Questions which were alluded to in argument, and were said to be of great importance at this time, — such as, whether, in the absence of a stipulation in the policy or in the charter or by-laws, there would be any right to a return of premium under any and what circumstances; whether the office or its assignee could cancel its policies after bankruptcy, or even after insolvency, without an order of court; whether the assured could do so after bankruptcy without such order, — are not material in this case, and have not been considered.

Petition to expunge denied.

JAMES E. AYLWARD *v.* MARTIN L. SMITH.

DECEMBER, 1872.

Under the usual bill of lading, the lay days do not begin to run until the vessel has arrived at her place of discharge, and is ready to be unloaded.

DEMURRAGE. — Libel, by the master of schooner Sandalphon, alleging that, on the seventh day of December, 1872, the Hoboken Coal Company shipped on board his vessel, then lying at Hoboken, in New Jersey, a cargo of coal, to be delivered to the respondent at Cambridgeport, Mass., for a certain freight, and the libellant signed a bill of lading therefor; that he proceeded on his voyage, and arrived at the wharf of the respondent on the 20th of December, and was detained there, by the respondent's neglect and default, for twenty-seven days beyond the time allowed for discharging cargo by the contract between the parties.

It appeared that the schooner was towed to the respondent's wharf in the afternoon of the 20th December, at about high tide; and was made fast outside of another vessel which was in the berth. This other vessel was hauled out on the next day; but the libellant's schooner was then hard aground, and so remained for some days, the tides being lower than usual. Afterwards, the ice made round her, and she could not be hauled in until the

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18th of January, when the cargo was discharged in less than two days.

The libel stated the distance of the schooner from the wharf to be thirty-five feet; and the evidence was somewhat conflicting as to the exact distance, the respondent maintaining that it was considerably greater. Both parties did what they could to break the ice and to haul in the vessel. On the 28th of December, the deck load of twenty tons was delivered by means of a staging or bridge; and it was alleged that more might have been landed in this way; but the respondents testified that the bridge was so slippery and dangerous that it was impracticable to use it further.

The bill of lading contained these words: "Usual dem. after three days, Sundays exc." It was agreed that this meant that the usual demurrage of eight cents per ton for each ton of the cargo was to be paid for every day the vessel should be detained beyond three days, exclusive of Sundays. The libellant demanded demurrage at this rate for twenty-seven days.

C. F. Walcott, for the libellant, cited *Abbott on Shipping* (11th ed.) 271; *Brown v. Johnson*, 10 M. & W. 331.

T. H. Russell, for the respondent.

LOWELL, J. It does not appear to me that the unfortunate delay in discharging this schooner arose from any fault on either side. I cannot agree that the defendant is responsible for the position which the master took up for his vessel while waiting his turn to unload. There was no hidden danger at that place of which warning should be given to strangers; and no notice was given by the master of his purpose to put the vessel there; no questions were asked or answered about depth of water, draft, or any thing else. The schooner lay in a place to which a tug master, well acquainted with the navigation, had taken her, and where she might well enough have awaited her turn at the dock if the accidental change of tides, caused by a change of wind, had not come on the next day, and if extreme cold weather had not set in at the same time.

It seems to be thought that a person who has a wharf with only enough water at ordinary times, and liable to be deficient on extraordinary occasions, or a wharf to which navigation is somewhat difficult or intricate, ought to be held to warrant the safe

approach of all vessels that are navigated with ordinary care and skill ; but I know of no such law. There was, as I have already observed, nothing said about the draft of the schooner, no deception, nothing to raise an inference that either party had any thought on this subject. The contract was to carry the cargo to Cambridgeport ; and both parties treated this as meaning the defendant's wharf in that port, as no doubt it did ; but there was no absolute engagement on either part that the schooner should be able to reach the wharf in any particular time.

The defendant did not engage, either expressly or by implication, that a berth should be always open for the libellant, whenever he should arrive. Any such implication would be most unreasonable, considering the uncertainties and delays that attend the navigation of sailing-vessels. And the bill of lading, in giving three days to clear the vessel, when the actual delivery of the cargo would take about half that time, appears intended to make allowance for some possible detention of this kind. Nor is there any ground for saying that the defendant could have taken out any more coal than the deck load in the mode in which that was taken, or that the master asked him to do so.

Neither party being in fault, the loss must fall on the plaintiff if his voyage was not ended and the lay days begun ; otherwise, on the defendant. A voyage of this kind is usually considered to be ended, as between the ship-owner and the freighter, when the ship has arrived at the place of discharge, such as the public dock, although not able to get a berth immediately : *Brown v. Johnson*, 10 M. & W. 331. It is upon this rule that the plaintiff relies. He says that he arrived at the wharf on the 20th of December, reported to the defendant, and ended his voyage. This argument is specious ; but it assumes that the vessel had arrived at the dock or wharf, when, in truth, she had only very nearly arrived. It has been held in two English cases, concerning cargoes of coals shipped under contracts almost identical with this, that delays within the port for a considerable time, owing to a want of sufficient water at the place of delivery would not require the freighter to receive the coals at another place, or cause the lay days to begin, though the contract had the clause that the ship was to go only so near to the place as she could safely get.

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It was held that, although she could not safely go up while the tides were neap, yet that was one of the accidents of navigation which a vessel contracting to go to a tidal harbor ran the risk of: *Parker v. Winlow*, 7 Ellis & B. 942; *Bastifell v. Lloyd*, 1 Hurlst. & C. 388. The distance at which the ship is kept from her berth by the low water is immaterial, if it be so far that the delivery of the cargo is prevented. Upon this point, which is chiefly one of fact, I hold that the vessel had not arrived.

Then, if the vessel is to earn demurrage, she must not only arrive, but be ready to deliver her cargo; and that readiness must continue at least during the three days which the contract gives to the consignee. If the acts of the master on the first day are looked upon as a sort of tender of his cargo, it is one of the essential qualities of a tender that it should be continuing. Thus, where freight was to be paid in three days after arrival, "and before delivering of any part of the cargo," and the vessel arrived, and on the next day the cargo was destroyed by fire and water, it was held that the freight was not earned, because it was implied in the contract that the vessel should be able to deliver the cargo at any time during the three days: *Duthie v. Hilton*, 38 L. J. (C. P.) 93; s. c. L. R. 4 C. P. 138. I have seen no American case so nearly analogous to this as those which I have cited from the English reports, though I have no doubt the law is the same in both countries. Upon the whole, I find that the libellant has not made out that his lay days had begun when this delay occurred, nor that it was caused by any default of the respondent. The result is, that the libel must be dismissed, with costs.

*Libel dismissed.*¹

¹ Affirmed by the Circuit Court, October Term, 1873.

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THE MARY PATTEN. — THE STAR OF THE EAST.

DECEMBER, 1872.

In a collision cause in which a steamer and a sailing-vessel were both found to be in fault, and the steamer, after the collision, had towed the schooner into port, — *Held*, an allowance might be made for towage as part of the damage suffered by the steamer, but not for salvage.

When, in such a case, both vessels were injured, and there was no ground for discriminating between them, the costs as well as damages were divided.

It seems, that if one party suffers all the damage, and both are in fault, the libellant recovering half damages, should usually recover full costs.

LOWELL, J. The parties have agreed to accept the assessor's report upon all matters of fact, and have submitted to me the questions of salvage and of costs. The steamer took the schooner in tow after the collision, and, still later, hired a tug that completed the service. When deciding the general merits of the case, I intimated the opinion that towage might perhaps be allowed; and I then understood that the libel for salvage would not be pressed if the steamer was found to be in fault. But my decision being that both vessels were in fault, the question has been brought up again. If the steamer had been solely to blame, there could be no claim for either towage or salvage, because all the loss which the other party had sustained, including towage and salvage, would be chargeable to the steamer; and whether she did the work herself, or paid others to do it, would be immaterial. On the other hand, if the fault were wholly that of the injured vessel, and she chose to accept salvage services, she might perhaps be bound to pay for them as such. How is it in case both were in fault? The master and crew of a vessel which has been in collision with another vessel, and has not been crippled, are morally bound to stand by and save life at least, and often to aid in saving property too, if possible. In England, a statute makes a neglect of this duty presumptive evidence of fault in respect to the collision itself; and possibly without the statute a judge might find it to be so under some circumstances. It was the practice of the admiralty before the act was passed to refuse costs to a ship in such cases, though it was otherwise blameless.

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This duty cannot be said to be of strictly legal obligation ; because no law has yet visited the offender with damages for a breach of it. Nor, indeed, would it be obligatory at all where life was safe, and a very great disproportion of the value of one vessel to the demurrage of the other made it inexpedient.

My view about the towage was this : It was necessary that the schooner should be towed ; and, if a tug was hired and paid by either party, the towage was a part of the necessary and proper damage to be divided ; and it was not a matter of importance which actually made the bargain or paid out the money. I have more doubt about allowing towage to the steamer herself ; but, granting that the act was proper and necessary, and for the benefit of both parties, it seemed to me I might consider it as part of the damage which the common fault had caused to the steamer herself, and thus bring it into the aggregate of the losses. In this way the assessor has made it up. This, in effect, gives the libellants half towage, or it may be called half demurrage for time properly spent in consequence of the collision. Such an allowance may tend to render steamers more prompt to lend their aid, and thus reinforce the imperfect obligation above mentioned.

The libellants say they should likewise have half salvage. But that stands very differently. In the first place, the relations of the parties were such, as now appears, that it was for the interest of both that the damage should be diminished as much as possible. If it had been necessary to pay salvage to a stranger, both must have contributed ; but that a salvage service should arise out of a disaster that was partly the fault of the salvors would be unheard of. The argument for the libellants is based upon the absence of a legal obligation to perform the service, such as prevents officers or men from being salvors of their own ship. No doubt, the usual definition of salvage would cover this case ; for it was a maritime service in saving property by persons not already legally bound to its performance. This is an excellent definition. But it must not be forgotten that a salvage reward, in so far as it exceeds a mere *quantum meruit* for work and labor, is dependent upon a rule of public policy for the encouragement of promptness, skill, honesty, and enterprise on the part of seamen and ship-owners, and is forfeited not only by misconduct, but by

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incompetency, after the work is begun. I think it fairly follows, by parity of reasoning, that previous misconduct may have a similar effect. It was said that the seamen on board the steamer were not in fault, and that they at least should have salvage. But the towage here was done by the steamer: the seamen took no actual part in it of any consequence; and there is no reason to suppose they have lost any thing by the slight delay which it occasioned. Besides, where a vessel is in fault, the crew are often involved in its consequences, without any actual fault of their own. The cases are many where salvage has been lost or diminished by conduct which was really that of the master of the salving vessel only. He is the agent by necessity of the ship and all persons interested in her. If the fault had been wholly with the steamer, no discrimination could have been made in favor of the seamen to give them a reward which their vessel could not share. I do not mean to decide that individual seamen could never, under any conceivable circumstances, have salvage in such a case. The counsel for the libellants very candidly cited *The Capella*, Law Rep., 1 Adm. & Eccl. 356, which is against his recovery. I have found nothing else so directly in point.

Whether the costs, like the damages, should be added together and divided, or each should bear his own, seems to be one of doubt. Judge Sprague decided that where both parties were in fault, yet if one was very much the more so, he should bear all the costs: *The Rival*, 1 Sprague, 128; see *The Celt*, 3 Hagg. 321. No question was made of the correctness of that decision, nor that the court has full legal discretion over the whole matter of costs to adapt its decrees to the equities of each case. But no facts are relied on here to take this case out of the ordinary rule, if there be one applicable to an equality of fault.

It is very difficult to find any rule from the decisions, in no one of which is there any argument or reason given at the bar or by the court. In the leading case of *Hay v. Le Neve*, 2 Shaw, App. Cas. 395, costs as well as damages were divided. So in *The Washington*, 5 Jurist, 1067; while in *The Wansfell*, 1 Spinks, 271, costs were given to neither party. In this district we have always followed *Hay v. Le Neve*. Judge Davis divided the costs in a case decided in 1832: *Sanctry v. Farrow*, Records, vol. xviii. p. 180,

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and in *Dimock v. Hathaway*, vol. xx. p. 230; and Judge Sprague, in *Lenox v. The Winisimmet Co.*, 1 Sprague, 160; *O'Neil v. Sears*, 2 Sprague, 52. I did so in *The Monticello*, — though this point is not reported, — 1 Lowell, 184; and Judge Leavitt, in *The Swann*, 6 McLean, 296. On the other hand, costs have been refused to both parties in *The Bedford*, 5 Blatch. 200; *The Miranda*, 6 McLean, 231; *The Nautilus*, 1 Ware, 534; *The Favorita*, 4 Bened. 134.

There is one aspect of the question which does not appear to have received sufficient attention. If the loss is all suffered by one vessel, and her owner brings his libel, he will recover half his damages; and there is no reason why he should not, in general, recover his full costs. It is the ordinary case of a prevailing party recovering less than he asks for; and if there has been no tender or offer of amends, and no equity peculiar to the individual case, it is according to the sound and reasonable law of all courts that he should recover costs. It would take a very long and uniform course of practice to establish any other rule in collision causes; and, although some of the decisions above cited were of that character, the point appears to have been overlooked. In examining some late authorities, since the above paragraph was written, I am happy to see that the recent practice in New York conforms to what I have suggested as the true rule, and gives costs to the libellant, if he alone has been injured and recovers half his loss: *The Austin*, 3 Bened. 13; *The Baltic*, id. 195; *The Paterson*, id. 299; *The Avid*, id. 434.

Returning to the case of injury on both sides, and of cross-libels to recover them, and no very substantial difference of fault or other equity, there appears to be authority for dividing the costs, and for refusing them to both parties. The former practice, which has always been ours, seems to me quite consistent with the theory which divides the damages; and I shall adhere to it until the direct authority of an appellate court, or a very decided preponderance of general practice, shall be against it.

Decree accordingly.

Re Hapgood.

Re L. B. HAPGOOD & AL.

JANUARY, 1878.

A payment, by an insolvent debtor, of a percentage on claims of a part of his creditors which does not lessen the percentage which his other creditors will receive, is not a preference.

BANKRUPTCY. — The petition by the Manchester Shoe & Leather Company of New Hampshire against the two defendants, doing business at Boston under the firm of Hapgood & Co., alleged a debt due from said firm to the petitioners of about \$1,000; and that said defendants, being insolvent, did, on the twenty-seventh day of December, 1872, and on the fifteenth day of January, 1873, make certain payments to two of their creditors by way of preference. The defendants filed a general denial of the acts of bankruptcy, and demanded a jury trial, which was afterwards waived, and the case was heard by the court.

It appeared in evidence that the defendants met with very severe losses by the great fire of Nov. 9, 1872, and immediately afterwards took an account of their assets and liabilities, by which it appeared that they could pay about seventy-five per cent of the full amount of their debts; and, by the advice of some of their creditors, they made an offer of fifty per cent, which was accepted by nearly all the creditors, who thereupon signed a paper in which was recited the loss by fire, and the desire of the signers to assist the firm to start in business again, and by which they agreed to receive notes on an average time of three months, for fifty per cent of their respective demands, in full discharge of the same. The settlement was completed; and, by the early part of January, the payments had been made, a large proportion of them in money, and to a few small creditors a round sum, which would exceed fifty per cent. There remained outstanding, according to the evidence, only the debt due to the petitioners, and one other of about \$700 or \$800, out of a total debt on the 10th of November of about \$83,000. After the settlement was completed, the defendants

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had in their hands net assets above all their debts to the value of about \$27,000.

The petitioners, through their agent in Boston, had at one time agreed to take eighty per cent of their account in full settlement; but some dispute afterwards arose concerning the mode of liquidation, and the bargain was never carried out. They filed their petition March 20, 1873.

The defendants had gone on in business during all the period after the fire; and the evidence tended to show that, after discharging their old debts, they had been and continued to be solvent. All their present debts, excepting the two above mentioned and some of the composition notes, had been contracted since the fire in the ordinary course of their business.

C. I. Reed & J. R. Bullard, for the petitioners.

N. B. Bryant, for the defendants.

LOWELL, J. I have decided that when one creditor stands by and sees a settlement made with the others, under such circumstances that his assent to the compromise is to be presumed, he is estopped to rely on that compromise as an act of bankruptcy. *The Mass. Brick Co.*, *ante*, p. 58. I shall probably adhere to that doctrine until a higher court has held it to be erroneous. But as this case was not argued nor placed upon the ground of the agreement concerning the eighty per cent, and the evidence upon that point may not have been fully developed, I must consider the important question, whether the payments made by the defendants in settlement with the great body of their creditors render them liable to be made bankrupts under the act. It was argued with great force and ability, that, after a trader is insolvent, there is nothing he can lawfully do by way of disposing of his property and settling with his creditors, excepting through the aid and intervention of the bankrupt court. Adding the qualification, hinted at above, that the acts complained of are done without the express or implied assent of all his creditors, the proposition is a sound one in a broad sense. That such a person cannot lawfully convey his property to trustees, even with the best intentions and the most careful provision for equality among his creditors, that he cannot do this or suffer it to be done, even with the sanction or by the decree of a State court,

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few lawyers will be found at this time to deny. All such arrangements, however innocent in intent, and however probably advantageous to the creditors, are made subject to the objection of any one of them, unless, as in a late instance, congress should make a special exception by a new statute. This is because the bankrupt law is and must be conclusively presumed to be the best and only authoritative rule, and to provide the exclusive method and machinery for the settlement of the affairs of insolvent persons.

But this case does not bring up any transfer of property excepting payments of money, nor any thing to withdraw assets from creditors; no appointment of a private assignee chosen by the debtors to present to creditors the alternative of their management or a lawsuit. It was simply a payment, to every creditor who would accept it, of less than his whole debt. I cannot agree that this is necessarily a preference. It has been often ruled, and lately by the highest tribunal, that a payment by an insolvent to a creditor, both parties knowing the insolvency, is to be presumed to be intended as a preference: *Toof v. Martin*, 13 Wall. 40. The presumption is not usually said to be a conclusive one; but, if it were, the payment referred to in all these cases is a payment in full, or of a larger proportion than others will have. The definition of a preference is, a payment to one creditor which will give him an advantage over the others, or which may possibly do so. It is impossible to define it without that idea being included. Now, supposing it could be shown, beyond any doubt, that a creditor, being anxious for his money, perhaps himself in great stress, took from a debtor, in full settlement, very much less than it was certain the others would get, who is injured? Is the assignee to be permitted to say, I will recover back this five per cent to add to the ten per cent I am paying to those who made no settlement? The case that I have supposed is the case at bar. It is proved, without the slightest attempt at contradiction, that the great body of the creditors, knowing that the defendants could pay much more, agreed to take one-half of their first demands. Their purpose was to leave the defendants solvent. In my opinion, they have succeeded. Indeed, it is not denied that the defendants are actually solvent;

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but the argument is pressed that they are technically bankrupt, because within six months past, they, being actually insolvent, made certain payments, and that nothing can purge this stain but the lapse of time. The argument is undoubtedly a strong one. If it is sound, any one of the new creditors of this firm, having a debt to the amount of \$250 or more, can put them into bankruptcy; because there is in our statute no provision that only those creditors can take advantage of an act of bankruptcy who were such when it was committed. The argument is strong; because it would not, in most cases, be possible for the court or a jury to ascertain with any certainty that a payment by an insolvent would not or might not be a preference, and it would not do to enter into any nice calculations on the subject. But when the very case does arise, in which there is no doubt, and no calculation needed to prove that the creditors who have been paid intended to take, and in fact did take, less than they would have received in bankruptcy, and that, when they were paid, the debtors were left undoubtedly and abundantly solvent, then it would be an inversion of the law to hold that the creditor who alone has gained by this course of proceeding, who is, on the day he files his petition, able to force a full payment at law, may resort to the court of bankruptcy as a speedier and more stringent mode of obtaining such payment. It must often happen, incidentally, that the bankrupt act can be worked by a shrewd creditor to his own particular advantage, by bringing a petition when the others wish to compromise the debts, or by opposing a discharge on account of some technical fraud, and by those means forcing a payment. This cannot always be avoided; but it must be guarded against, as far as the weakness of the parties concerned will permit. If they choose to submit to exactions, it is not possible for the courts to prevent it. I do not mean to cast any imputations on the petitioners in this case. If they did not choose to give up part of their debt, they were under no obligation to do so, unless they once agreed to terms, as to which I am not fully informed. What I mean is this: In the present aspect of the case, it is really prosecuted to obtain payment in full of the petitioners' debt, which they are fully entitled to receive; but this is not the court to give it them. To test the question of preference, I

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asked the counsel of the petitioners if he should feel himself obliged to refuse payment in full. I did not, however, require a categorical answer to that inquiry. In my opinion, there would not be the slightest impropriety in his taking payment; and, if not, it is because the defendants are solvent, and, if they are, they were so as soon as they had made such an arrangement with their creditors that their assets were clearly and fully above the remaining liabilities, and they could go on and pay all their remaining debts as they accrued.

I do not intend to encourage any compromises but such as are full, fair, and equal. If any of the creditors who took fifty per cent were given to understand that no one should have more, or were deceived in the exhibit of assets, they might well complain. But there is no evidence of this; and the natural inference is, that any one would know there was danger that some few creditors, by refusing to come in, would be able to make better terms than the rest. In the absence of any complaint of that sort, I do not feel bound to listen to one from the party benefited.

If I should decide this case for the petitioners, I should be obliged to say that an insolvent person cannot receive a present of \$25,000; for that is precisely what happened to the defendants. I am not prepared to go that length in support of a general formula. The proposition with which I began, that insolvents must, in general, invoke the intervention of the bankrupt courts, must be further modified to express the idea, that what they do in the way of payments they do at their own risk and that of the creditors who are paid, in case it should turn out that any one is or can be injured; but if there is no possible harm done, there is no act of bankruptcy.

I do not rest my decision on the ground that the particular payments mentioned in the petition were not acts of bankruptcy, while some earlier payments may have been so. In my judgment, no such act has been committed at any time. No payments were made until all the creditors were understood to have assented, though a few, like the petitioners, were to have more than fifty per cent. The agreement was to take notes; and, if notes had been given, it is perfectly evident that the effect would

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have been to diminish the debts one half, and leave the assets as they were, making a gift, as I have said, of about \$25,000 to the firm. The agreement being completed, the firm were solvent, for the same reason; and, finding themselves able to pay the dividend in money, they made it in that way to those that wished it. Each payment was the discount of a note they had a right to insist on giving, and was a substituted payment. Not one was made until the solvency of the firm was established beyond a peradventure, by the signature or assent of all, or nearly all, the creditors to the agreement.

At the argument I expressed a doubt whether solvency could be proved, excepting by the convincing argument of a tender in court of the full amount of the petitioning creditors' debt; but as this is not a court for the collection of debts, I do not think, when the evidence is so clear, I ought to hesitate to pronounce that the solvency is proved. Indeed, if the firm had become insolvent again by a new misfortune, my decision in this case would be the same. I do not say there might not be cases in which the debts might be required to be paid before a decree of dismissal should be entered. Nor am I sure that a somewhat larger discretion over the matter of costs might not be safely and wisely intrusted to the courts.

Petition dismissed, with costs.

LEONARD STUDLEY v. J. K. BAKER & AL.

MARCH, 1873.

If the owners of a vessel which has performed a salvage service make a settlement with the owners of the property saved, and receive the salvage, the crew may recover from them a due share of the reward by libel in admiralty.

Where a coasting schooner rendered such a service to a frigate, and a sum of money was paid by the United States to the owners of the schooner, who signed a receipt for owners, master, and crew, — *Held*, the crew were entitled to a share, although the owners testified that they did not consider the services of the crew in making the settlement.

Where the principal service had been performed by the vessel acting as a lighter, and the actual work of lightering had been done by men from the vessel in distress, the owners and master of the lighter were allowed three-fourths of the salvage, and the crew one-fourth.

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SALVAGE. — The libellant alleged that in January, 1870, he engaged as mate on board the schooner *Harriet Gardner* for the general coasting service from port to port in the United States during the season, at monthly wages, and served therein until the times after mentioned. That, on the 6th of October, 1870, the schooner, with the libellant on board, fell in with the frigate *Guerrière* ashore on a dangerous shoal in Vineyard Sound and in great peril; that the schooner and her crew assisted the frigate by carrying out an anchor and by lightering her, being employed in the service for two days, and being exposed to peril and hardship; that, by this aid, with that of other vessels, the frigate was saved; that there was awarded and paid, by the government of the United States, to the two defendants, who were the owners of the schooner, and one of whom was the master, the sum of \$3,500; that the services were salvage services, and the sum assessed was paid for such services, and the libellant was entitled to his share thereof; but the respondents refused to pay him any thing.

The answer set up a want of jurisdiction in admiralty; admitted that the money was paid the respondents, but alleged it was not for salvage, nor for any services of the libellant, but for the use of their vessel, and for damages and expenses accruing to them alone as her owners, in respect to the lightering, &c.

There was evidence that the schooner was of about fifty tons register, and carried on this occasion a master, mate, and cook; that, seeing the frigate in distress, about ten miles off, they went alongside, and were asked to help in carrying out an anchor; that the master said he had no crew, and the officer replied that the frigate had plenty of men, and he ordered thirty-five or more to go on board the schooner, and these men did most of the work. How much the libellant actually did was in dispute; but it was not denied that he was ready to do whatever was required, and that he assisted more or less in managing the schooner. A very heavy anchor was put on board, and the schooner was somewhat damaged by collision with the frigate, without any fault on her part. She was delayed about thirty days in repairing the injuries.

R. B. Forbes, Esq., acted as agent for the government in settling with the respondents for their compensation; and a letter

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from that gentleman was read as part of the *res gestæ*, in which he suggested to the respondents a basis of settlement, to which they assented, and according to which the payment was made. From this letter, it appeared that the respondents were paid several specific sums for repairs, for demurrage, — including wages and board of crew and loss of employment of the schooner, — and for injury to cargo ; and, besides these, there were two items, as follows : —

Value of services lightering	\$540
Ditto, carrying out anchor	1,000

The total was \$3,535, the odd dollars being for interest after the adjustment was arrived at. For this sum, one of the respondents gave a receipt, expressed to be for the owners, master, and crew of the schooner. The owners testified that they did not consider the libellant at all in the settlement.

G. Marston, for the libellant.

J. M. Day, for the respondent.

LOWELL, J. The question of jurisdiction is an interesting though not a difficult one. I shall examine it at some length, because the reported cases, though unanimous, are not numerous ; and the point has been thought worthy of argument in the case. Admiralty courts are so peculiarly well fitted to deal with salvage, that cases of that sort are very rarely brought elsewhere. Judge Peters once said that he should be much disposed to consider the jurisdiction exclusive, and that he had never seen the report of such a case at common law : *The Fair American*, 1 Pet. Adm. 87, 93. A few years after these remarks were made, there was a case in which a single salvor recovered a verdict and judgment at law for salvage, no question of jurisdiction being raised : *Newman v. Walters*, 3 Bos. & P. 612. There is one case in equity, arising out of the refusal of Judge Betts to take jurisdiction in admiralty (see *One Hundred and Ninety-four Shaws*, Abb. Adm. 317), in which the owner of goods was permitted to maintain a bill against the agent of alleged salvors to pay the salvage, if any, and redeem the goods : *Cashmere v. De Wolf*, 2 Sandf. 379. The court, in that case, say they would not take jurisdiction if an admiralty suit were pending. In another case, in equity, con-

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nected with the same transaction, the jurisdiction was denied: *Frith v. Crowell*, 5 Barb. 209. In the same court that had upheld the jurisdiction in equity, a very learned and able opinion was soon after given by one of the judges against the existence of such a jurisdiction at common law; but the case was decided on a different point: *Sturgis v. Law*, 3 Sandf. 456, *per* Paine, J. A question of salvage appears to have been involved in the case of *Peck v. Randall*, 1 Johns. 165; but in a way that presented no difficulty, and no question was raised on this point.

In 1858, the court of queen's bench decided that one of the crew of a vessel that had performed a salvage service could not maintain an action against the owners of the property benefited; because no promise to pay could be implied. They said, very truly, that in the admiralty courts the proceedings were independent of contract: *Lipson v. Harrison*, 2 Weekly R. 10. This decision virtually ousts the jurisdiction of common-law courts, excepting in those few cases in which a contract could be proved. If the question, for instance, were to arise, whether a promise might not be implied to pay the master of the salving vessel, the answer would be, that the master is not the agent of the crew in such a business; and, it having been decided, as we shall see presently, that the courts of common law have no jurisdiction of a suit by the crew against the master for a share of salvage, they would be obliged to say, I think, that they could not award the salvage to the master. In *Lipson v. Harrison*, the learned judges said that *Newman v. Walters*, *ubi supra*, was the only case on the subject; and they evidently doubted whether they could have jurisdiction under any circumstances.

The courts of common law recognize a lien in salvors so long as they retain possession of the goods saved; and there are several cases in trover which decide this point: *Hartford v. Jones*, 1 Ld. Raym. 393; *Baring v. Day*, 8 East, 57; *Baker v. Hoag*, 3 Selden (7 N. Y.), 555. But whether they would, at the present day, pass upon the amount due for salvage, by leaving to the jury the sufficiency of any tender that may have been made, I do not undertake to say. See the remarks of Judge Betts, in *A Raft of Spars*, Abb. Adm. 291.

Reported cases, at law, for distribution of salvage are equally

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rare with those on the general subject. In the exchequer in England, in 1862, the judges decided that such an action would not lie; and they all said they had never heard of such a case. They commented on the great embarrassments which would surround an attempt to settle such a question at law: *Atkinson v. Woodhall*, 1 Hurlst. & C. 170. A similar course of argument concerning the analogous case of a suit for prize-money is found in the opinion of Story, J., in *Maisonnaire v. Keating*, 2 Gall. 342. In this country, two actions have been brought and sustained at law for a share of salvage; but in the former there was no question of jurisdiction raised, and in the latter there was decisive evidence of a contract which might found an action of assumpsit: *Blake v. Patten*, 15 Maine, 173; *Hawkins v. Avery*, 32 Barb. 551. I have cited all the cases of any importance that are known to me at law or in equity; and they leave the jurisdiction of these courts in much doubt.

That a court of admiralty has such jurisdiction, I cannot entertain the slightest doubt. The liability of the defendants does not rest on a promise, express or implied, so much as on the duty of the owners to pay the men their wages, and whatever else is due them by virtue of their employment in the vessel and of the incidents of the voyage. The amount is not liquidated, and can be conveniently ascertained only by a court of admiralty, which distributes salvage according to its own views of propriety and justice. The money, in this case, was taken by the defendants upon a trust which may sometimes be enforceable at law or in equity, and always in admiralty. Indeed, a suit for distribution of salvage is really a salvage suit, and is always so denominated by good pleaders.

A salvage suit may be instituted against the property saved, or the owner of the property, if he has accepted it *cum onere*; or it may be brought by the owner against the salvors for restitution of his property after payment of salvage: *Post v. Jones*, 19 How. 150. So it may be brought by part of the salvors against the others for a distribution. Such a suit was entertained by Judge Davis in this court as early as 1807: Records, vol. ii. p. 213, *Jewett v. Hill*. In 1828, in the southern district of New York, a like action was brought by an owner against the master, who had

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received salvage money abroad, and had sent it home: *Waterbury v. Myrick*, Blatch. & How. 34. Betts, J., said that he had no doubt of the jurisdiction, but should not make it a point of decision, because it was not properly pleaded. He could not, in fact, avoid making it a point of decision; because consent cannot give jurisdiction of the subject-matter, though it may of the parties.

In 1830, Judge Davis made a decree for the libellant in another similar case, though without recording any opinion: *Cook v. Ellery*, Records, vol. xvii. p. 232. In 1831, there was a case before the same judge, exactly like the one at bar. It was a libel by some of the crew against the master of their vessel, alleging that they had picked up two logs of mahogany, and that the defendant had sold them, and had paid nothing to the libellants. The answer insisted that the libellants had been paid their wages, and that, as they had incurred no risk or labor, they ought not to have salvage. But salvage was decreed: *Fernald v. Two Logs of Mahogany*, Records, vol. xviii. p. 60. In 1839, the jurisdiction was sustained by Judge Ware in a careful opinion; in which, however, this point is treated as clear: *The Centurion*, 1 Ware, 477. In 1852, Judge Sprague decided such a case in the same way: *Coombs v. Dow*, Records, vol. xxxiv. p. 268.

In England, it is possible that the exercise of this function may have fallen into disuse with so many other of the proper powers of the admiralty. Such would seem to be the bearing of the remarks of Dr. Lushington, in giving judgment in *The Hope*, 1 W. Rob. 267, and in *The Britain*, id. 45, note. If so, it has long since been restored by statute. I have not followed out this inquiry, because it is of no practical importance here. If it were so, it is certainly remarkable, and testifies very strongly to the difficulties attending the exercise of the jurisdiction at law, that no case was known to the learned judges of the exchequer to have been brought at law, even when the powers of the admiralty court were in abeyance. I suppose the remedy must then have been in equity.

It having been agreed by counsel that the decision should not be delayed to make the other salvor a party, but that he should be settled with on the basis of the decree, I proceed to consider the merits of the case. It is plain that the \$1,540 was paid as

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salvage. Mr. Forbes says so in his letter, as plainly as he could say it, without using the word "salvage." It is so much for services in carrying out an anchor and in lightering. The services were of the character of salvage; and the compensation was such as to indicate beyond mistake that it was so understood, because it was more than five times the value of the use of the vessel for a month, as allowed in the same settlement. Then the receipt was for owners, master, and crew; and no explanation of those words is possible, except that it was salvage, because the United States had no occasion to pay the master and crew any thing unless as salvors. It was said that the government had overlooked the crew, and had made payment only for the use of the vessel; but the receipt negatives this conclusively, and so does the whole aspect of the case. It would be most improbable that the United States should undertake to settle the case in parcels; and the owners ought not to be presumed to be looking after their own interests only. But it is not needful to go into presumptions, because it is perfectly plain that it was the intent of both parties to adjust the compensation for the whole salvage service. The respondents may have thought that the two men were not to be considered; that they had earned nothing, and ought not to put forward any pretensions. This is what their evidence means; that, though they have settled with the government, yet they have not settled for the libellant, because he never had any claim on the government. They have assumed to settle the whole case, and to give a receipt binding on the libellant; and they, at least, are not to be heard to deny their own authority, or to say that if the libellant has a right to any thing, they are not the persons from whom to recover it.

Nor is it any less certain that every man on board a salving vessel, who is ready to do what he can, is to share in the remuneration. The whole matter depends on a large and liberal policy, which looks almost as much to the general interests of commerce as to individual deserts. Those owners of ships whose crews are engaged in salvage always receive something, whether they can prove any actual damage to their voyage or not. The only difficulty is in the distribution. Considering that it is true, as set up by the owners, that the use of their vessel was chiefly as a lighter

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worked by the men of the *Guerrière*, and that no great labor or hardship was imposed on the libellant, and that the owners have been at all the trouble of obtaining the money from the United States, I think it would be fair to give a somewhat larger share than usual to the owners. Taking them to have received by this time, including interest, about \$1,600, I divide it into eighths, of which the libellant and the other man would be entitled to one, or \$200 each. *Decree for libellant for \$200 and costs.*

G. W. SLOCUM v. JIREH SWIFT & AL.

MARCH, 1873.

In the absence of fraud, a contract between the master and owners of a whaling-ship cannot be varied by parol evidence.

A contract between owners and master for a whaling voyage not exceeding five years' duration does not mean several voyages extending through five years, but ends when the object of the voyage is fulfilled; that is, when a full cargo is obtained.

When the voyage was to end at New Bedford, and the parties afterward agreed to end it at San Francisco, the master was allowed the expenses of his passage to New Bedford.

The owners were allowed freight on oil from San Francisco to New Bedford.

A master was allowed a commission for selling oil after the voyage was ended; but was not allowed extra pay as cooper for eighteen days, when the cooper was ill. Commissions charged for sales by the owners were disallowed.

WAGES. — WHALING VOYAGE. — The libellant was master of the bark *Louisa*, which, by the articles, was "bound from the port of New Bedford, on a voyage not exceeding five years in duration." By the first article it was agreed "that the term of service of any of the undersigned shall not end, nor shall any one be entitled to a discharge, until the expiration of said term, unless said ship shall sooner return to said port of New Bedford, and the voyage be terminated." The libel propounded that the voyage was begun May 4, 1869, and was prosecuted in the Atlantic and South Pacific Oceans until March, 1872, when the libellant received orders to take the ship to San Francisco and fit her for a cruise in the Arctic Ocean; that the libellant was not bound to

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serve in the Arctic, but he took the vessel to San Francisco and delivered her to the owner's agent, and spent eighteen days in fitting out the ship for the new service.

It was admitted that the libellant's pay, if due, was nearly \$6,000, and a considerable part of this was paid him before the hearing. The respondents denied that the libellant had any right to refuse to go to the Arctic, or any strict title to be paid before the return of the ship to New Bedford. Several items of charge on the one side and the other were disputed, as is sufficiently explained in the opinion of the court.

T. M. Stetson, for the libellant.

G. Marston, for the respondents.

LOWELL, J. In the absence of fraud, the contract of the master of a whaling-ship with his owners cannot be varied by parol evidence. The only authority cited for the libellant is *The Cypress*, Blatch. & How. 83, in which Judge Betts says, that seamen have, in numerous cases, been permitted to prove that the articles did not set forth correctly the agreement entered into by them, and that, even without evidence, the court will set aside agreements injurious to the seamen. The cases which the learned judge gives in this connection are all in support of the latter clause of his proposition, or rather of his second proposition, that the admiralty court will set aside unreasonable clauses. Mr. Justice Curtis examines the question with great ability, and cites many cases against the admission of the evidence, though he differs from them, and admits the parol proof, on the ground that the statutes of 1790 and 1840, and especially the tenth clause of the latter, make void a contract with seamen, if it does not state the voyage truly; and he holds that parol evidence may always be given to show illegality as well as fraud in a contract: *Page v. Sheffield*, 2 Curtis, C. C. 377. That case settled the law for this circuit, upon an intelligible, if debatable, ground; but it has no application to the libellant's contract, because a whaling voyage is not within those statutes, and because the master is not a seaman by those laws. They require the master to make a written contract with the men, but leave the owners to make their own arrangements with their agent, the master; and if these parties make a written contract, it must be con-

strued and acted on like all other written contracts made between parties of equal standing. All the cases, therefore, which Mr. Justice Curtis distinguished from the case before him, become valuable in deciding this controversy.

The learned judge who decided the case of *The Cypress*, above cited, reconsidered the point twenty years afterwards, and in a careful opinion laid down the doctrine that seamen bound themselves conclusively by the articles in the absence of fraud or deception: *The Atlantic*, Abb. Adm. 471. One of the head-notes to *Willard v. Dorr*, 3 Mason, 161, is, that the shipping articles are evidence of the terms of hire, even of the master or his apprentice, but are not conclusive. On turning to the judgment, p. 169, we find that the objection was taken by the owners that the master usually made the contract himself behind the backs of the owners, and therefore it could not be used as evidence in his own favor in a suit against them. Story, J., decided that the articles were, *prima facie*, presumed to import verity, and to be as well known to the owners as to the master, and that if the owners intend to contest them, they should give evidence of fraud, mistake, or interpolation. His course of reasoning clearly goes to hold the master himself bound, unless he, on his side, can show like grounds for setting aside the written contract.

Leaving out of view the parol evidence, what is the meaning and effect of this contract? The libellant contends that the description, "a whaling voyage not exceeding five years in duration," means that he is bound to serve until he obtains a full cargo of oil, but in no event more than five years. The owners read it that he is to serve for five years, if they choose to order him to remain abroad so long, no matter what may have been his success, and that they can order him to pursue the business of whaling in any seas to which they may choose to order him. Although, as I have said, the master is supposed to be *sui juris*, and not to be under the care of the court to the same extent as the seamen, yet, as we know that the articles in a whaling voyage are always, in fact, drawn up by the owners, or by their order and direction, they ought to be taken most strongly against the owners. If they intend a series of voyages to any and all parts of the world, they ought to be careful to express this

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clearly in the contract. The words, "a voyage," seem rather to imply that when the object of the voyage has once been accomplished the ship is to return home. Such is the opinion of Judge Ware in *Gifford v. Kollock*, 3 Ware, 45. Whether the articles in that case contained the provisions, which are found in these, for the master to ship oil home or elsewhere, "during the voyage," I do not know. This is the only part of the contract that seems much to favor the respondent's construction. This clause was introduced into the form of articles used in New Bedford; and I have upheld the stipulations of the crew to allow the charge and freight on oil so shipped, upon evidence that it was beneficial to both parties, and necessary to the successful prosecution of the business as now conducted, especially if ports on this coast would compete with others nearer the whaling-grounds.

But I have never before been called upon to say whether that permission modified the contract by implication in respect to the voyage itself. I do not think it ought to have that effect. It would undoubtedly aid in construing an ambiguous agreement, and the effect of taking advantage of it may sometimes be that the ship will, on the whole, send and bring home more than a full cargo; but its primary purpose in such a contract as this, which is for one voyage, must be held to be of a secondary character, intended to relieve the ship of the trouble and risk of carrying her oil about wherever there may be occasion to cruise before the voyage is completed.

It is very difficult to reach any satisfactory conclusion from the letters between the parties, whether they understood the articles in the one way or the other. There are expressions both of the master and of the owners, which tell against the construction they now set up respectively. But I think it results from the whole correspondence, that whatever may have been thought to be the strict rights of either in the matter, which were in no sort made a question at that time, the contract was so far modified by consent of both, that a return to New Bedford was abandoned, and the voyage was ended at San Francisco. This being so, I think the libellant is fairly entitled to have his passage home paid by the owners; because this is the general rule, and ought to be implied, where nothing is agreed to the contrary. He had

offered to pay his passage home from New Zealand, but under different circumstances, and that offer was never acted on.

It does not follow that the defendants were bound to transport the oil to New Bedford at their own expense. Oil has no domicile; although the contract undoubtedly is, that the crew are to make the oil, and the owners are to transport it, yet, so far as these parties are concerned, the question of freight depends upon the contract as modified by common consent. When they had agreed upon San Francisco as the terminus, the owners might have sold the oil there, if that course would have been for the best interests of the parties; or they might have shipped it to New Bedford "or elsewhere," in the language of the shipping articles, provided no delay of settlement was caused thereby, and a higher price was obtained, after deducting freight and other necessary charges. They were bound to exercise their best skill and judgment in disposing of the oil and bone at the best accessible market. I understand that the course they took proved to be the best.

For the oil that was sold at San Francisco for the convenience of the defendants, to enable them to refit the ship without sending out funds for the purpose, the master should be allowed the same price as was obtained for that which was sent home, less the proportionate freight. If the libellant performed services at the port of discharge beyond what were in the line of his duty, such as selling oil for the prosecution of the new enterprise, he ought to be paid for them. His lay covers every thing he would have been bound to do, or might choose to do, in relation to the voyage itself, and no more. The owners have charged him a commission on the sales which he effected; this charge must be rejected, and the same or some equivalent charge be transferred to the other side of the account.

The commissions at the home port were never allowed by Judge Sprague. He thought the custom to charge them was not reasonable, because it appeared to be a charge by the owners for performing their part of the contract. I see no reason to depart from this course of decision. Indeed, I believe I have followed it before. The owners in many cases do not sell the oil, if they prefer rather to pay the cash market price and take

Slocum v. Swift.

the chance of a rise. I do not say that the master might not compel a sale of so much as would establish the market price, but I have never known this to be insisted on ; and the commission, so far as it is charged for selling the oil, is not only for work which the owners do as part of their contract, but which they in fact, in the majority of cases, do not do till after the settlements are made. So far as the commission is intended as compensation for the services of agents, the case must stand precisely as if there were but one owner. If the sole owner sold the oil and made up the accounts, then, according to the decisions, he is merely doing what is necessary to ascertain the lays, and should not charge for it ; and it is no concern of the master and men whether the owner finds it convenient to employ an agent or not.

In asking pay for doing the cooper's work for eighteen days, the libellant appears to be standing on what he considers his strict legal rights. One who ships in any capacity takes the chance of extra labor, care, and responsibility which may devolve on him by any accident of the voyage. If the mate had fallen ill for a short time, the master could not, I think, have claimed mate's pay in addition to his own for an increase of work ; nor could the mate, if the master had been ill for a short time. On the other hand, it has often been decided that a man or a mate, who is promoted *de facto* or *de jure* during a voyage, is afterwards to have the wages of the higher station. There are many cases of meritorious conduct and arduous service, in which no legal title to extra pay can be recognized, but reliance must be placed on the liberality of owners or underwriters. It is not easy, perhaps, to lay down the precise limits of the strict right. Each case must be decided on its own facts. Here I decide that there was no such service performed as requires the owners of this ship to pay the master any wages as cooper, though it may be he would have had a legal claim on the cooper.

This opinion will enable the parties to settle the account, I suppose, without reference to an assessor.

Interlocutory decree for the libellant.

The Benjamin English.

THE BENJAMIN ENGLISH.

MARCH, 1878.

Where the master of a vessel engaged in the coasting trade agreed with the owner for sixty dollars a month as wages for himself and for his minor son, who acted as cook, and it was understood that two-thirds of this sum were for the master's services and one-third for those of his son, and the owner of the ship had died insolvent, — *Held*, the contract was severable, and there was a lien on the vessel for wages due the son.

Where, in such a case, the master had received earnings of the vessel, but not enough to pay all the wages, — *Held*, the net earnings so received were to be appropriated to the master's and cook's wages *pro rata*.

WAGES. — Libel by a boy of sixteen years old for services as cook on board the schooner Benjamin English, at twenty dollars a month. The schooner was employed in the coasting trade during the summer of 1872, and the evidence tended to show that the master, who was the father of the libellant, had agreed with the owner, who had since died insolvent, that he would serve for forty dollars a month, and his son for twenty dollars; that the master had received the earnings of the vessel and paid its disbursements, and had rendered an account, in which a charge was made for the libellant and himself at sixty dollars a month, and by which a balance remained due to the master. The answer averred that the contract was solely with the master, at sixty dollars a month, and that he had more money in his hands than was needed to pay all that was due for the wages of both him and his son. None of the seamen signed any articles.

G. A. King & H. P. Harriman, for the libellant.

J. M. Day, for the claimants.

LOWELL, J. The theory of the libel is, that the master engaged the libellant at twenty dollars a month, as he hired the other men, and that the owner of the vessel assented. The defence, as I understand it, is, that the contract was entire for the services of father and son for sixty dollars a month, payable to the father. It is proved, to my satisfaction, that the sum of sixty dollars was arrived at by estimating the wages of the master and cook at the several rates contended for by the libellant,

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and the contract was in its nature severable, or rather was two contracts, so that if either the libellant or his father had failed to perform his part, the other, having fulfilled his own, might sue for liquidated damages at the rate agreed on. And when it turns out that the owner's estate is deeply insolvent, the libellant may justly claim a lien for his services, like any other seaman, unless it be true, as alleged in the answer, that the father has actually received the payment for them. The father may, if he chooses, permit the libellant now to proceed, or may, as next friend, bring a libel in his name, notwithstanding the circumstance that he happened to be master of the same vessel. The master has no lien on the ship, by our law, but the master's son has one. The disability does not extend to his family.

On the other hand, I do not find the proof to be that the father had emancipated his child *quoad* this voyage, and notified the owner thereof, so that a settlement could not afterwards be made with the former, or that payment to him would not release the debt. It was very candidly admitted at the argument, that it was not until the insolvency was discovered that this point was brought prominently to the mind of the father. In his evidence concerning the contract, which was admitted without objection, though perhaps part of it was not admissible, the other party having died, the father seemed to attempt to give the color of an emancipation to his conduct and conversation with the owner and with his son; but the account which he rendered, and his course of dealing with his son for years before, throw much doubt on his intentions, and even the facts that he gives do not seem to me to amount to such notice as would bind the owner to deal only with the son. If, therefore, it were true, as set up in the answer, that the master had funds unaccounted for, more than enough to pay the full sixty dollars a month, the son must look to the father for his pay. But the evidence has no tendency to bear out this allegation.

Still I do not regard the rights of this libellant to stand precisely like those of any other seaman. His contract is involved with that of his father: to the two together there would be due about four hundred dollars; and if the father has received out of freight-money two hundred of this, he cannot now say he

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will appropriate these payments exclusively to his own wages, for which he has no lien, and leave the libellant, or himself on the libellant's behalf, his full charge upon the vessel as against the general creditors. It was held by Judge Sprague, that, in some cases, a creditor having two debts is bound to appropriate a payment in the way most beneficial for the debtor, as, for instance, towards the debt for which he holds a lien; and certainly that rule would be peculiarly fitted to a case in which he pays himself out of money in his hands: *The Antarctic*, 1 Sprague, 206. I have decided that a rule of even more general application requires payments to be appropriated to the earliest items of an open account: *The A. R. Dunlap*, 1 Lowell, 350. Taken either way, the result in this case is the same; and the wages of both father and son will be deemed paid *pro rata*, as they accrued, if the account shows that something has been received on account. It appears, then, to be the true rule for this case, that one-third of whatever remains due to the libellant's father should be held to be for the wages now sued for, and to that extent there is a lien on the schooner. The account was not fully examined at the trial, and I do not know whether there is enough remaining due to pay the libellant in full. If the parties cannot arrive at the balance due by their own investigations, it will be necessary to have it examined by me, or by an assessor.

Interlocutory decree for the libellant.

THE LADY FRANKLIN.

MARCH, 1873.

A vessel in motion and under command is presumed to be in fault if a collision occurs between her and a vessel at anchor in a harbor in the daytime.

The laws of Massachusetts give to the harbor-master of Boston the power to designate places of anchorage for vessels in the harbor of Boston; and a place so designated is a proper place, though in the channel.

Those laws require all vessels to keep an anchor watch at all times.

An anchor watch is not bound to take any active measures to get his vessel out of the way of a vessel under command approaching in broad daylight at the rate of eight knots.

Such a watch is not bound to hail the approaching vessel, unless he discovers that his vessel is not seen. He has a right to suppose she will be seen.

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COLLISION. — The libellant's case was, that his schooner, the *Ida J.*, was anchored in the harbor of Boston, in a lawful and proper place, at about noon of the 22d July, 1872; and that the *Lady Franklin*, a schooner of about ninety tons register, was running out light, making about eight knots, with a free wind and favorable tide, and ran so near the *Ida J.* that the jib-boom of the latter was caught in the leach of the *Lady Franklin's* fore-sail, and the vessels were entangled for a time, and some injury was done to the complainant.

The defence was, that the *Ida J.* was lying in an improper place, without an efficient anchor watch, and that the collision might have been avoided if the libellant's schooner had been either sheered or dropped astern, or even if a hail had been given.

Two witnesses deposed that the *Ida J.* was anchored in a position designated by the harbor-master, and had been lying there three or four days, waiting an opportunity to discharge her cargo of timber; that the tide was half ebb, and the depth of water at the place of collision about fourteen fathoms. The expert witnesses for the defence were of opinion, that, if there was as much water as was testified to, the *Ida J.* must have been anchored in the channel; and the master and mate of the defendant vessel arrived at the same conclusion from observation. The experts testified that an anchor watch was bound to keep a constant and vigilant lookout, and to take all necessary measures for avoiding collisions, and that the measures mentioned in the answer would have been successful in this instance.

F. Dodge, for the libellant.

L. W. Howes, for the claimants.

LOWELL, J. That a vessel which is in motion is bound to avoid one lying at anchor, is a rule so plainly founded in reason, that there can never have been different opinions about it. It may be well enough, notwithstanding, to note a few of the many cases in which it has been distinctly affirmed under various circumstances: *The Girolamo*, 3 Hagg. 169; *The Louisiana*, 3 Wall. 164; *The Granite State*, id. 310; *The John Adams*, 1 Clifford, 404; *The D. S. Gregory*, 6 Blatch. 528; *The Scioto*, Daveis, 359 (2 Ware, 360); *The Julia M. Hallock*, 1 Sprague, 539; *The Wanata*, 4 Bened. 310. In *The Granite State*, above cited, Mr. Justice Grier says,

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that the fact of collision with a stationary vessel is conclusive evidence of fault on the part of the moving vessel. This means, I suppose, that testimony of actual vigilance will not suffice to rebut the presumption of the want of it under any ordinary circumstances. In this case there is nothing to excuse the respondent vessel. This is one of those rare instances in which the evidence is wholly free from obscurity or contradiction. The day was clear and fine, the wind moderate, the *Lady Franklin* was coming down with a free wind in a direction parallel to that in which the libellant's vessel was heading, and there was no difficulty in seeing and avoiding her. No reason has been given or suggested why this was not done, excepting that the crew were busy in stowing the anchor and preparing the vessel for sea, and that they happened to be on the windward side of the vessel, where the sails interfered with their view. This, of course, is no excuse for not keeping a vigilant lookout, while navigating a harbor likely to be full of vessels in motion or at anchor.

It is ably argued, with the support of accomplished experts, that the libellant's schooner was anchored in the channel, out of place, and that the anchor watch, if the men on deck can be called so, kept no sufficient lookout, being busy, like those of the sailing vessel, in work about the deck, and failed to do their part in the navigation; and so that the loss of both vessels should be divided. There is evidence tending to show that the *Ida J.* was anchored in the channel, though, perhaps, near the edge of it; that she had been there for some days, and had taken the position pointed out by the harbor-master. It is a mistake, I apprehend, to maintain that the law prohibits anchoring in the channel. The statute of 1847, ch. 234, § 1, 8 Mass. Special Laws, 800, forbids vessels to come to anchor within five hundred feet of certain lines; but there is no evidence that this vessel was within that prohibition. Sects. 5 and 6 provide for appointing a harbor-master, and authorize him so to regulate the anchorage of vessels, that, as far as may be practicable, ferry-boats may pass unobstructed, and the channel may be kept clear from the wharves to Castle Island. This is not a positive requirement that the channel shall be kept clear, but that the harbor-master shall arrange matters to have it kept so, as far as may be practi-

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cable. It was not practicable, I suppose, for this schooner to anchor on the flats, because her deck-load would be likely to strain her when she took ground ; but, at any rate, the harbor-master is, by the law, made the final and only judge of this ; and the fact that this vessel was placed by him is not directly contradicted, as it might have been, if false, and the only implied contradiction is found by assuming that he would not have placed her in the channel, which I do not feel at all justified in taking for granted. This part of the case is much stronger for the libellant than was that of *The John Fraser*, 21 How. 188, in which the learned chief justice, delivering the opinion of the court, which, on this point, appears to have been that of all the judges, said that the harbor-master appeared to have acquiesced in the ship's being where she was, though it seemed contrary to the ordinance of the city of Charleston, and that the court ought to take his practical construction of the local rule as sufficiently exacting. In this case there was something more than acquiescence on the part of the officer of the port, and a less positive command on the part of the law, requiring no latitude or laxity of construction to warrant his conduct or acquiescence as being within the scope of his duty as defined by law.

The statute of 1848, ch. 814, 8 Mass. Special Laws, 1007, enlarges the powers of the harbor-master, and by sect. 4 provides that all vessels at anchor in the harbor of Boston shall keep an anchor watch at all times. The evidence was not particularly directed to the inquiry whether the master of the *Ida J.* had notice or knowledge of this law ; but no denial was made of such knowledge, and it appears to be very generally known, and was assumed to be so in the whole conduct of the case. Granting that this fact was so, and that the law is binding on the libellant, the questions are, what are the duties of an anchor watch ? and, was there such a failure to fulfil them as renders the *Ida J.* jointly responsible for the collision ? The statute takes for granted that the duties of an anchor watch need no explanation. I have looked into the books without finding any definition. Mr. Dana, in his Dictionary of Sea Terms, p. 129, describes " anchor watch " as a small watch of one or two men kept while in port. Captain Totten, in the Naval Text-Book and Dictionary,

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p. 443, defines it as a watch of three or four men kept constantly on deck, and stationed at one of the anchors, while riding at single anchor, to see that the stoppers, painters, cables, and buoy ropes are ready for immediate use. The experts examined in the case of *The Rival*, 1 Sprague, 128, and those who testified for the defence in the case at bar, agreed that 'one man is a sufficient anchor watch.' The experts in this case added that he was bound to keep a thorough and constant lookout, and to be ready to take measures to avoid a collision; and that he should have discovered the Lady Franklin, and have either sheered his vessel's head towards the flats, or have let out her chain, and should, besides, have hailed the approaching schooner; and that in their opinion either of the two first-mentioned measures would have been effectual. Notwithstanding this testimony, I am hardly ready to decide that an anchor watch is bound to the same vigilance, at all events in the daytime, as the lookout of a vessel under way. The name would seem to imply, in accordance with the definition of Captain Totten, that the original purpose of this watch was to guard against the ship's dragging or drifting, by looking carefully to the anchors and cables. And the fact, fully admitted at the trial, that one man is all that the law or usage requires, confirms this; for one man cannot be expected to do efficiently all the various things which the experts seemed to expect of this watch, and there is no obligation on the remainder of the crew to be on board in fair weather. I do not mean, of course, to say that the anchor watch is not to do whatever may be needful and possible to prevent a collision. My doubt is whether he is bound to be constantly and vigilantly on the lookout against the negligence of approaching vessels, which are under full command, and are bound to see and avoid him, and have ample and undoubted opportunity to do their whole duty. If so, the next thing will be to require a man to be stationed at every wharf that adjoins the channel, to warn vessels not to run against it.

But if it be admitted that the crew of the *Ida J.* ought to have seen the Lady Franklin, I cannot agree that they were bound, or would be authorized, to change the position of their own vessel. It is a point that comes up in nearly all cases of collision,

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whether the vessel which is bound to keep her course ought not to have seized an obvious occasion to change it. I have nothing to add to what I have often said upon that subject. While I admit that a vessel is not to be obstinately kept in position when it is nearly certain that, by a change, she may enable the other vessel to escape the consequences of a mistake or neglect, yet it is only in extreme cases that a change can be permitted, without throwing all the rules into confusion. A vessel at anchor is bound to keep her place. If the *Ida J.* had been sheered to the right, it might have caused a disaster; because the *Lady Franklin* had the option to pass on that side, if she chose, and there was at that time water enough on either side. The experts think that there was a moment when they could have seen, had they been on the deck of the libellant's vessel, which way it would have been safe to sheer her. The law does not require an anchor watch to have the skill and experience of these gentlemen. It would not trust him to sheer his vessel. Similar observations apply to the other proposed action, by dropping down with the tide; for this would have had the same effect, or nearly so, as sheering.

Nothing remains but the question whether the crew of the complaining vessel are to be held to have contributed to this misfortune, by their failure to see and hail the other vessel. This I have virtually decided, in holding that they were not bound to the same vigilance in observing approaching vessels that the latter should exercise towards them. The parties are by no means *in pari conditione*. As the vessels were lying in parallel lines, and the *Lady Franklin* was coming down with a free wind, and going over the ground at about eight knots, it would hardly occur to a lookout to anticipate danger until the last moment; because a very slight change of the *Lady Franklin's* helm would carry her clear. If such a lookout had seen the schooner coming, I do not know that he could be held bound to notify her to keep out of the way. I do not remember that a vessel entitled to hold her course has ever been held liable, merely because she did not hail.

I have examined with care the decisions on this subject. In most of those in which the anchored vessel has been blamed, it

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was for want of a light at night. In two cases, in which the want of an anchor watch has been found to be a fault, the approaching vessel was not under command, but was drifting towards the other slowly, and could have been easily avoided by one of several simple precautions, for which there was ample time: *The Petrel*, 6 McLean, 491; *O'Neil v. Sears*, 2 Sprague, 52. The case most favorable to the respondents is *Simpson v. Hand*, 6 Whart. 311; but in the opinion delivered in that case the chief justice, at p. 324, puts the decision upon a usage of navigation in the Delaware. "It seems," he says, "to be the custom of the Delaware for the crew of a vessel, at anchor in the stream, to give such a sheer as may prevent a vessel in the act of passing from running foul of it in case of accident." What may be the limitations or conditions of that usage, and whether it depends on local circumstances, I do not know; but no usage is proved here to sheer vessels at anchor, and in my judgment it could not be done with propriety in such a case as this, without a usage to warrant it, or a hail to ask for it. While a person of great skill and coolness might have succeeded in moving the *Ida J.* in time, I cannot think that any obligation rested on her people to be prepared for such an extraordinary emergency, unless warned of it by the moving vessel. The parties cannot be held to be, I will not say equally blameworthy, for that is not the question, but to be at all on a similar footing: the duty rested on the party that could most easily perform it, and his failure brought about the disaster, without any legal culpability on the other part. *Decree for the libellant.*

Re E. W. CLAP. — Ex parte J. C. SMITH.

MARCH, 1878.

The mere exchange of the note of a firm, dissolved by the death of one partner, for a note similar in all respects to the surrendered note, signed with the firm's name, by the surviving partner, does not convert the joint debt into a separate debt of the surviving partner, unless it appears that such conversion was intended by the holder of the note.

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BANKRUPTCY. — The facts concerning the partnership of E. W. & S. G. Clap, and its dissolution by the death of the latter, the provisions of his will, and the state of the accounts and assets, were shown, in the case of George G. Tarbell, petitioner (*ante*, p. 168). In 1852, J. C. Smith lent the firm \$1,000, and took their promissory note, signed in the firm name, and was afterwards, before the death of S. G. Clap, paid \$250 of the principal sum; interest was paid him yearly; and, in June, 1871, after the death of Samuel, he surrendered the old note, and took a new one, signed in the same firm name, which he held at the time of the bankruptcy. Neither party had any intention of changing the security by giving and taking the new note; and whether Smith knew of the death of one partner is uncertain. The change was made merely because the old note was worn, and covered with indorsements. Smith petitioned to prove his debt against the joint estate.

T. L. Wakefield, for the petitioner. 1. The new note was not payment of the old debt. Even in Massachusetts, whose law goes farther in this direction than that of most of the States, a note is only presumed to be payment until shown not to be so intended: *Butts v. Dean*, 2 Met. 78; *Curtis v. Hubbard*, 9 id. 328; *Watkins v. Hill*, 8 Pick. 522; *Reed v. Upton*, 10 id. 524; *Thurston v. Blanchard*, 22 id. 21; *Melledge v. Boston Iron Co.*, 5 Cush. 170.

2. Taking the note was not an accord and satisfaction; because there was no new consideration and no advantage: it merely lost him one promisor: 2 Pars. Contr. 683, and notes (*g*) and (*h*).

3. The consideration of the debt determines against whose estate it should be proved: *Ex parte Christie*, 3 M., D. & DeG. 736; *Ex parte Brown*, 1 Atk. 225.

W. A. Field, for the administrator of S. G. Clap. 1. Death of a copartner is a public fact of which persons interested are to take notice: *Marlett v. Jackman*, 3 Allen, 287.

2. The firm having been dissolved by the death of one partner, the survivor cannot bind his estate, unless by a contract duly made in closing up the business; and this note does not purport to be given by E. W. Clap as surviving partner, and was not so given in fact: *Palmer v. Dodge*, 4 Ohio St. 21; *Lockwood v. Com-*

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stock, 4 McLean, 383; *Parker v. Macomber*, 18 Pick. 505; *Perrin v. Keene*, 19 Maine, 355; *Lumberman's Bank v. Pratt*, 51 id. 563; *Lusk v. Smith*, 8 Barb. 570; *Hurst v. Hill*, 8 Md. 399; *Kilgour v. Finlyson*, 1 H. Black. 155.

3. The petitioner may have mistaken the law; but he did the act he intended to do, and the legal consequences are conclusively presumed to be within his knowledge and intent.

It is now well settled that an express or implied agreement to take the continuing partner as sole debtor is founded on good consideration, and slight circumstances will be sufficient to prove that the assent of the creditor to such a conversion: *Thompson v. Percival*, 5 B. & Ad. 925; *Shaw v. McGregory*, 105 Mass. 96; *Ex parte Chaninell*, 3 DeGex, F. & J. 752; *Evans v. Drummond*, 4 Esp. 89; *Hart v. Alexander*, 7 C. & P. 746; Robson on Bankruptcy, 508, 509, and *notes*.

Mr. Wakefield, in reply. If the note be treated as made by the surviving partner, it was within his authority as such: *Ide v. Ingraham*, 5 Gray, 106. See, too, Pars. Partn. 404; 5 Whart. 530; *Brown v. Clark*, 14 Penn. St. 469; *Robinson v. Taylor*, 4 Barr, 242. There are no circumstances, even slight, to prove a conversion of this debt.

LOWELL, J. The doctrine laid down in *Lodge v. Dicas*, 3 B. & Ald. 611, and *David v. Ellice*, 5 B. & C. 196, that a promise by a joint creditor to look to one partner only and release the other is void for want of consideration, was soon changed in England by the case of *Thompson v. Percival*, 5 B. & Ad. 925, which has been followed ever since. And it is now perfectly well settled that such a contract is not void, and that the reason given for holding it so is unsound, since a separate debt may be more beneficial to the creditor than a joint debt: *Hart v. Alexander*, 2 M. & W. 484; *Lyth v. Ault*, 7 Exch. 669. Supposing the partners to have agreed to convert the joint into a separate debt, the only inquiry is, whether this has been assented to by the creditor; and this is usually to be ascertained from the conduct of the parties. See an excellent summary of the decisions in 1 Lindley, Partn. (2d ed.) 358. The question arises often in bankruptcy; because the fund out of which the creditor is to be paid may depend upon the answer. In bankruptcy, the prevailing doctrine is, that if the

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continuing partner has assumed the debts, whether by deed or parol, and the joint creditors have assented, before the bankruptcy, the conversion is complete. "It is apprehended," says Collyer (Partn., 5th Am. ed. § 918), "that the conversion must depend on the assent [of the creditor], in whatever manner the assent is evidenced; that, although there be a deed, bare assent will be sufficient, though it would be insufficient at law; and that where there is no deed, assent will be necessary, although perhaps it might be unnecessary at law." In this country, the courts were reluctant to lose sight of the old common-law idea that a promise to take the sole responsibility of one of two joint debtors was *nudum pactum*; but I understand the later English doctrine has now fully prevailed here. For a discussion of this point, see *Re Johnson & Stowers*, ante, p. 129.

When the partnership has been dissolved by the death of one partner, the joint remedy is lost; but his estate may be followed in chancery, unless equitable considerations exist to prevent it, such as an express promise, or a course of dealing, or other circumstances, like those which would exonerate a retiring partner at law. Mr. Lindley, at the place above cited, says, "A court of equity will consider all the circumstances, and decline to assist the creditor, if, upon the whole, justice so requires;" but adds, that the small number of cases in which relief has been refused, compared with those in which it has been granted, shows the leaning of the court in favor of the creditor. And this remark is fully borne out by the authorities: *Devaynes v. Noble (Sleech's Case)* 1 Meriv. 530; *Winter v. Innes*, 4 Mylne & C. 101; *Harris v. Farwell*, 15 Beav. 31. In Massachusetts, the debt is severed at law by the death, and the creditor may proceed against the estate of the decedent as if for his sole debt. Gen. Stats. ch. 97, § 28. It is not necessary to resort to chancery; but the citations above given will prove that the rule is substantially similar in both jurisdictions. In bankruptcy, notwithstanding the severance, the joint creditor retains his right to be paid out of the joint estate: *Burnside v. Merrick*, 4 Met. 537; *Howard v. Priest*, 5 id. 582; *Lodge v. Prichard*, 1 DeGex, J. & S. 610; *Ridgway v. Clare*, 19 Beav. 111; *Hills v. McRae*, 9 Hare, 297. In this case, there is no evidence that the estate of Samuel Clap was entitled to

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be exonerated from the joint debts, or that the bankrupt had agreed to assume them, or any other of the circumstances or equities from which such an agreement would be inferred; so that there is no foundation on which to base a supposed assent of creditors. The case stands nakedly on the fact that the creditor has taken a negotiable security from the surviving partner. It is undoubtedly true, that if a creditor of two partners takes the negotiable security of one, in satisfaction of his debt, his remedy against the other is gone. The leading case of *Thompson v. Percival*, above cited, was of that character. This decision is approved by Mr. Justice Story, Partn. (6th ed.) § 155, and see the cases in note 3 to that section. But if the note or bill of one partner is not taken as satisfaction, but as security for the joint debt, the creditor may, if the security is dishonored, sue or prove in bankruptcy, as the case may be, on the original debt. Indeed, he may often have his election to prove against one or the other. This is familiar law in ordinary transactions, and has been often applied to the case of partners. Thus where, at the time of taking the separate security, the creditor expressly reserved his rights against the retiring partner, and retained the bill which had his name upon it, no discharge was worked: *Bedford v. Deakin*, 2 B. & Ald. 210. The intent is the pivot of the matter; though there are a few cases, like *Harris v. Lindsay*, *ubi supra*, in which the intent is conclusively presumed from conduct which would amount to a sort of estoppel, of all which circumstances this case is free: *Potter v. McCoy*, 26 Penn. St. 458.

The difference between the law of Massachusetts and that of England and most of the States of the Union, I understand to be merely this: That in the courts of this State a negotiable bill or note is taken to be a more beneficial security than a book account, or any debt of that kind, and, though it does not operate as a merger in law, is presumed *prima facie* to be taken as payment. But it is a mere question of fact, and any evidence which rebuts the presumption is competent, and it is easily overcome. In other courts, the ordinary presumption of fact is the other way. On the other hand, I suppose that it is not difficult to find cases out of Massachusetts in which the deliberate exchange of one note for another is presumed to be intended as a payment

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of the note given up; but this is rather because the old one is given up than because the new one is taken. See *Newmarch v. Clay*, 14 East, 239; *Arnold v. Camp*, 12 Johns. 409. But the question always comes back to the intent of the parties. *Melledge v. The Boston Iron Co.*, 5 Cush. 158, cited by the petitioner, much resembled the present case. There the plaintiffs sold goods to an incorporated company, and took the note of its agents, supposing the signature to bind the company. The judge at the trial ruled that if the plaintiff received the notes under a misapprehension concerning the identity of the parties, and this mistake was caused by the acts of the company, the original debt would not be merged or lost. This instruction was held by the court to be sufficiently favorable to the defendants. I do not consider the latter clause of the instruction, that the belief was induced by the acts of the company, to be essential. The question is one of intent; and, if there was a misapprehension, that is enough, provided no equities have intervened to make it unjust to correct the mistake. It was on this ground that the ruling was sustained, and was said to be not too favorable to the plaintiff. It was less favorable than the law would have warranted. In this case, I am asked to presume that the petitioner must have known the death of one partner, the contents of his will, and the legal effect of these facts; and thence to infer that the note was taken for whatever it might legally turn out to be; which, on the face of it, is precisely what the old one was, but in law, it is said, can only bind the bankrupt individually. If there was a mistake, it is added, the law only was misconceived.

If the mere fact of the exchange of notes were shown, the presumptions might follow; but inferences cannot prove what both parties testify was not the fact. If the mistake were wholly one of law, such a mistake is often sufficient, even in a criminal case, where policy allows no mistakes of law, to rebut an inference of intent; but the mistake here appears to have been partly concerning the *status* of the partnership, depending on facts not known to the petitioner, though he might, perhaps, if the contrary were not proved, be presumed to know them.

There is another point to be considered. The surviving partner, who was likewise executor of his brother's will, was liable in

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two capacities to pay this debt ; and his giving a note for it, in one capacity, ought hardly to be held to exonerate himself in the other, especially when on the face of it the intent is to bind both. By the death the debt was severed ; the creditor might sue the surviving partner for the whole at common law, and he might sue the executor for the whole by virtue of the statute. Why should an acknowledgment of the debt by one exonerate the other, in the absence of any direct evidence of such a purpose, and even against the direct evidence ? I hold, therefore, that this note ought not in bankruptcy to be construed as the separate note of E. W. Clap, doing business under the name of the late firm, because it was not so intended by the parties ; and that the note, whatever it may be in itself, being made under the circumstances admitted here, does not convert the debt into the separate debt of the now bankrupt, nor extinguish the original liability of the old firm ; and it follows that the petitioner is entitled to come in against the joint assets remaining *in specie* of the original firm.

Order accordingly.

UNITED STATES v. MICHAEL MOORE.

APRIL, 1873.

False swearing, under Stat. 1st March, 1823, § 3, 3 Stats. 771, is committed by knowingly swearing falsely to any material fact, though that fact be only the witness's belief of a material fact. But it is not committed by rash or reckless swearing.

A defendant made affidavit that a certain treasury note, of which he produced a fragment, had been nearly all destroyed on a certain day, which was not true in fact. There was some evidence from which the jury might have inferred that the defendant, though rashly, believed the fact to be as he stated it. The indictment charged that the defendant made the statement knowing it to be false. *Held*, the jury should be asked to find whether the defendant made the statement knowing it to be false ; and that a further instruction, that the offence would be made out by showing that he swore to personal knowledge of the fact, when he knew he had no such knowledge, was erroneous, because there was no evidence that he had sworn to such knowledge.

An affidavit to the existence of a fact does not import that the affiant has personal knowledge thereof, unless so stated, or the fact be of such a character that he must have personal knowledge.

Whether a written affidavit contains such a statement, is a question of law, and should not be left to the jury.

United States v. Atkins, 1 Sprague, 558, examined and explained.

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INDICTMENT. — FALSE SWEARING. — The statute of March 2, 1863, § 1, 12 Stats. 696, is, that any person in the land or naval forces of the United States, or in the militia in actual service in time of war, who shall make, or cause to be made, any claim upon the government of the United States, knowing such claim to be false, fictitious, or fraudulent, or who shall, for the purpose of obtaining payment of any such claim, make any false . . . statement, certificate, affidavit, or deposition, knowing the same to contain any false or fraudulent statement or entry, or any false oath to any fact, statement, &c., may be tried by court-martial, and be punished. Sect. 3 authorizes the punishment by any court of competent jurisdiction of any person not in the military or naval forces, who shall do any of the acts prohibited by the foregoing provisions of the act. The act of March 1, 1828, enacts, that if any person shall swear falsely in support of a claim against the United States, he shall, upon conviction thereof, suffer as for wilful and corrupt perjury. 3 Stats. 771.

The second count of the indictment charged that the defendant, on a certain day, at Boston, made a false and fraudulent claim against the United States, for the redemption of a certain treasury note of the denomination of fifty dollars, issued under a certain statute, set out by its title and date; and, for the purpose of obtaining payment of said false and fraudulent claim, the defendant caused to be presented to the treasurer of the United States a fragment of said note, and did make representation in writing that said note was, on or about the 17th of March, 1871, nearly all destroyed, which was false; that said note had never been destroyed, but had been redeemed; that the defendant, in support of his said claim, did make a certain declaration in writing of the following tenor. There is then set out, in full, the alleged false statement concerning the destruction of the note. And it is further alleged, that the defendant, well knowing that the said declaration was false, did subscribe it, and make oath to its truth, at Boston, before Charles H. Fleming, a justice of the peace, empowered to administer an oath in this behalf. It set out the matter in which the statement was false, and that the defendant well knew it to be so; that the matters so sworn were material for obtaining payment of said note; and concluded: "And so the jurors say, that

the defendant did knowingly swear falsely in support of a claim against the United States, before Charles H. Fleming, a justice," &c. This count was drawn under sect. 3 of the act of 1st March, 1823, *ubi supra*.

The evidence tended to show that a considerable number of notes like the one in question in this case had, after their redemption by the treasury, been mutilated by some person in the employ of that department, by cutting out the vignette. It was not shown that this was done with any fraudulent purpose, or that any injury had in fact been intended, or had resulted, to the government, or that the defendant knew these facts; nor was there any testimony tracing this fragment from Washington to Boston. A boy, who lived near the defendant at South Boston, testified that he picked up the fragment in the street on a day when there had been a procession and a fight; that he gave it to his father, to see if it was of any value. The father testified that he gave it to the defendant, for the same purpose; and he said he supposed the remainder of the note had been destroyed in the fight, and he thought he told the defendant so. The truth of this story was denied by the government. Upon the affidavit being presented at Washington, the fact was at once discovered that the note had been redeemed long before.

The jury found the defendant guilty on the second count; and he moved for a new trial upon several rulings, which had been duly reserved, but are not necessary to be here referred to, and upon one part of the charge, which is recited in the opinion of the court.

I. W. Richardson, for the defendant.

E. P. Nettleton, assistant district attorney, for the United States.

LOWELL, J. I have made up my mind that my instruction to the jury upon one point was not sufficiently full and explicit, and may, perhaps, have misled them, to the injury of the defendant. I charged in the words attributed to Judge Sprague, in *U. S. v. Atkins*, 1 Sprague, 558, "that the jury must be satisfied that the defendant swore to a declaration which, at the time, he knew to be false; and that may be either by swearing to a fact which he knows is not true, or by swearing to his knowledge of

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the fact when he knew he had no such knowledge." There appears to be a much fuller report of the charge in that case, 19 Law Reporter, 95, from which, and from an examination of the records of the court, vol. xxxix. p. 696, I find that there was but one trial of the action, and that there was a count for perjury, and one for false swearing, under the statute of 1823, which is the law on which the second count proceeds in this case, and on which the report in the Law Reporter says the government relied in that case. It seems, therefore, that the authority is fully in point; but, by the more ample report of it, I find that the learned judge explained his meaning carefully, giving very full examination to the point whether the defendant had intended to state the fact as being within his own knowledge. Even with these explanations, I do not regard the ruling as being precisely accurate, as I will hereafter explain.

There is some difference of opinion in the United States as to whether perjury, or false swearing in the nature of perjury, can be committed by mere rash and reckless statements on oath; and though my charge, rightly understood, did not authorize the jury to convict the defendant, if the evidence only showed recklessness, yet I am not sure it may not have been understood in that sense. Indeed, I think my own views were not quite distinct upon the point. Mr. Bishop, in his treatise on Criminal Law (3d ed.) vol. i. § 396, says: "Probably the better opinion is, that perjury is not committed by any mere reckless swearing to what the witness would, if more cautious, learn to be false; but the oath must be wilfully corrupt." In a note, he quotes, as opposed to his own opinion, an extract from a report of the penal code commissioners of New York: "An unqualified statement of what one does not know to be true is equivalent to a statement of that which one believes to be false." The latter proposition may be nearly true, so far as the effect of the statement on others is concerned; but it is not a sound legal definition of perjury. I agree, rather, with Mr. Bishop's opinion, that there must be some fact falsely stated, with knowledge of its falsity, before there can be perjury. It has been held, indeed, by an able and learned court, that rash swearing, without any reasonable or probable cause of belief of the fact sworn to, is perjury: *Com.*

v. *Cornish*, 6 Binney, 249. That was a case in which the defendant had been wounded in a riot, at night, and had sworn to the prosecutor as the person who wounded him. The doctrine was denied to be law, in an able and careful charge to the jury in the circuit court of the United States, sitting in the same State: *U. S. v. Shellmire*, Baldwin, 370. It has been virtually denied in this State, in *Com. v. Brady*, 5 Gray, 78, where the defendant swore that he saw a man running from a burning building, whom he believed to be A. The judge charged in the language of the court in Pennsylvania, and the ruling was set aside. The court, to be sure, put their decision upon the ground that the defendant only swore to his belief; but personal identity is almost always a matter of belief. An affidavit or statement, that I saw a certain person, does not usually import any thing more than that I saw some one whom I believed, and still believe, to be that person. If I saw no one, or if I believed the person to be different from him I have named, it is perjury; but not otherwise. If any material circumstance is falsely stated, such as that the witness was present, and heard a certain conversation, it has been held to be perjury if he were not present, though the conversation really occurred: *People v. McKinney*, 3 Parker, Crim. C. 510. In such a case, the materiality of the circumstance would be the only question. Granting the materiality of the fact, whether it be a statement of knowledge, or of information or belief, or a simple statement of a fact, if the witness knows that the fact is not so, or that he has no such information, or no such belief, he is guilty. But if he only swears rashly to his belief of a matter of which he does not profess to have personal knowledge, the jury cannot be permitted to decide on the reasonableness of his belief, except as tending to show whether he did believe. In short, perjury is always of some matter of fact; and belief may be a fact. In this case, the only questions of fact put in issue by the indictment and by the law are: Was the statement false? and, Did the defendant know it to be false? In this respect, it is like the offence of passing a counterfeit note, knowing it to be counterfeit. Proof of reasonable cause of belief may warrant a jury to find knowledge; but it is not the legal equivalent of knowledge.

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It was proved that the defendant made oath to the statement set out in the second count ; but it does not expressly appear by the paper itself that he professed to have personal knowledge of the fact. If he only intended to state his belief, there were some circumstances sworn to, which, whether satisfactory to the jury or not, were proper to be considered by them on the question of belief. There was some evidence that the fragment of the note was picked up in the street on St. Patrick's Day, and that the father of the boy who found it gave it to the defendant, and suggested to him that perhaps the note had been torn up in a riot or street fight that took place then and there. In the case of *U. S. v. Atkins, ubi supra*, the false oath was, that a certain shipping paper was the original agreement with the crew ; and the evidence tended to show that the defendant knew nothing whatever about it personally. The form of the oath, as in this case, was positive, without saying any thing about knowledge, or means of knowledge or belief. Judge Sprague, in charging the jury, said : " Did the defendant, by swearing positively, mean to swear that he had personal knowledge that it was the original agreement ? The defendant could not swear that it was the original agreement, unless he was present when it was made. All else would be information and hearsay. The question is, Did he mean to make the collector understand that he had knowledge it was the original contract ; or did he merely mean to swear that it was such to the best of his knowledge and belief ? The matter for you to decide, gentlemen, is, whether you are satisfied that the defendant, in order to deceive the collector, wilfully and intentionally swore to what he knew was false, either as to the agreement being genuine, when he knew it was not, or to his knowledge of the fact, when he was conscious he had no such knowledge." 19 Law Reporter, 98. Now, this ruling is undoubtedly sound in the abstract, and it is what I told the jury ; but the difficulty in my mind is, that there was no sufficient evidence in the case from which they could infer that the defendant did state the destruction of the note to be within his personal knowledge ; and therefore I should not have brought that secondary fact to their notice at all. And here I differ from the charge in *Atkins's Case*. The ruling in that case, with all the limitations and qualifications which it appears that

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Judge Sprague put about it, would probably do no harm ; but I must say that in my opinion the learned judge should have ruled, on an affidavit wholly in writing, that it did or did not, as matter of law, import a statement of personal knowledge, and not have left that question to the jury. In that case the jury were unable to agree. In the similar case of *U. S. v. Smith*, 19 Law Reporter, 91, they acquitted the defendant. The court and jury in those cases agreed that an affidavit to a fact does not necessarily include an affirmation that the affiant has personal knowledge of the fact ; and my own observation of the conduct and opinion of men in general in this matter agrees with that view. I consider the affidavit in this case ought not to be held to import such a statement, none such being expressed, and the fact not being one which was personal to him. The true question, therefore, for the jury was the one which the indictment points out: Did the defendant swear to this fact, knowing it to be false? I do not mean to say that there was not evidence from which the jury might have answered this question in the affirmative; but, as I cannot say how they would have answered it, I feel it to be my duty to grant a new trial. *New trial ordered.*

THE LEOPARD.

APRIL, 1873.

A steamer and a schooner were approaching each other in the night-time, and the schooner neglected to show a torch, as required by statute 28th February, 1871, 16 Stats. 459 ; but the crew of the steamer saw the schooner at least as early as the torch ought to have been shown ; and the collision appeared to have arisen from a mistake of the position of the schooner in the channel, and not from a failure to see the schooner. *Held*, the fault of the schooner did not contribute to the collision.

COLLISION. — Libel by the owners of the schooner *Brutus* against the steamer *Leopard* for damages, propounded that the schooner, loaded with sand, was coming up Fort Point Channel, in the harbor of Boston, at eleven o'clock at night, on the second day of September, 1872, heading about south-westerly, with a

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light north-westerly wind, not enough to give her steerage way, when she was run into and instantly sunk by the steamer. The answer of the master, who was the claimant of the steamer, set up that she was coming down the harbor in order to proceed to sea, and was making only about three knots an hour; that the master was at the wheel, and the mate on the lookout, and both lights of the schooner were seen about one-eighth of a mile distant; that the schooner presently starboarded, and showed her green light, upon which the steamer's head was turned a little to port, in order to pass between the schooner and the town; that the schooner then began to swing across the steamer's course, showing first both lights, and then only the red light, upon which the engine was reversed as quickly as possible, and they hailed the schooner, but to no purpose.

The evidence tended to show that the schooner was a small vessel loaded with sand, which was to be delivered at South Boston; that she intended to come to anchor below the bridge of the Hartford & Erie Railroad Company. On rounding into this channel, the schooner had taken in her mainsail and jib, and dropped the peak of her foresail. Her witnesses testified that her helm was kept at port all the time after she came into the channel, so that she was edging in towards the wharves; but that the wind died away, and she was drifting up with the tide when the collision happened, it being then flood-tide, within about an hour of high water. They hailed the steamer to port her helm; but heard nothing from her, and saw no change in her course or in her speed.

The witnesses for the defence insisted that there was a four or five knot breeze; that the schooner changed her course; and that the steamer reversed her engine, as alleged in the answer. It was proved that the schooner's running lights were set, and burning, but that she showed no torch.

I. T. Drew, for the libellants.

J. C. Dodge, for the claimant.

LOWELL, J. The case turns on the conduct of the schooner; because the night was fine, both vessels were easily to be seen, and were seen. The steamer was bound to avoid the schooner, and cannot excuse her failure to avoid her, except by showing

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some fault of omission or commission on the schooner's part, which either misled the steamer, or frustrated her manœuvres, or prevented the schooner being seen soon enough. The charges are, that the schooner changed her course, and that she showed no torch. The former is denied; the latter is admitted, but it is denied that any ill consequences resulted from the neglect.

I cannot reconcile the evidence, nor account for all the differences; but my best judgment is, that the schooner did not make the changes which the master and mate of the steamer say she made. The conclusion that no starboarding took place on board the schooner rests on the positive evidence of her crew, on the statement of two disinterested witnesses looking on from another schooner, and on the very great improbability that a vessel going up this channel with a fair wind should take such a foolish course, without any motive. This point being found for the schooner, very much weakens the case against her; because the whole foundation is taken from under the answer, which makes the schooner's starboarding the reason for a like order on the part of the steamer. How the officers could have made such a mistake, I know not; but the fact detracts very much from the value of their succeeding observations of supposed changes of the lights. As they are the only persons who saw any change, I should feel unwilling to take it as proved on their testimony.

It is argued that the crew of the libellants' vessel virtually admit a change of course, when they say either that they put the helm to port, or that they kept it there at and after the time the steamer's lights were seen, unless we adopt their further statement, that they had no steerage-way. I am rather inclined to think the preponderance of the evidence makes out that the schooner had not steerage-way during the last few minutes before the collision; though I agree that the master must have thought he had wind enough to reach his anchorage ground when he took in most of his sails; but it had, perhaps, died away. Supposing it even a four-knot breeze, I don't know how fast this schooner would work under two-thirds of her foresail, but I suppose she would have not much more than steerage-way.

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That precise question is not a vital one, in my judgment; because I do not consider that the schooner did change her course in any such way, or to any such extent, as to cause or contribute to this collision. If she kept her helm ported, which I understand she did, I see no reason to believe that this caused any change of course of the least consequence, if it caused any at all, on her part. I do not know that the rule of the road requires a sailing-vessel always to steady herself in the exact direction she is in when she sees a steamer approaching; that is to say, to put her helm amidships at once, and keep it there, if it is at the port or starboard. If she was going very slowly towards the right of the channel, and continued to go, so far as she went at all, in the same direction, I doubt very much whether this would be a change of course in the sense of the law,—even though it were true, as I think it is not, that she had in that way crossed over some considerable part of the channel from the time she was first discovered. I doubt whether the law means to draw any distinctions so fine as to prohibit a vessel that is crossing a channel to continue to cross it when a steamer is discovered. However, I do not believe that any such thing took place, or that the schooner's continuing to keep her head somewhat to the right had any thing to do with the collision. The great fault of conduct was in the steamer's putting her wheel to starboard; and there was no time, in my opinion, after this was done, when any thing on the part of the schooner could have changed the result.

The schooner did not comply with the act of 28th February, 1871, § 70, 16 Stats. 459, requiring every sailing-vessel, on the approach of a steamer during the night-time, to show a lighted torch upon that point or quarter to which such steamer shall be approaching; and the burden is upon the libellants to show that the neglect neither caused, nor contributed to cause, the unfortunate issue. This burden I consider the libellants to have sustained. The master and mate of the steamer appear to have seen the schooner early enough to have avoided her, and as soon as there was any obligation to show a torch; and the mistake which they made of supposing her to be on the easterly side of the chanuel does not seem to me to have arisen at all from any

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imperfect view of the schooner, but from a misconception of the situation and character of the channel itself. I suppose the new regulation in the act of 1871 was intended to give an additional warning to steamers, in case of need, and one the use or neglect of which could not well be disputed; so that if the red and green lights were not lighted, or were dim, or were overlooked, there should be still another means of calling attention to the sailing-vessel. But when it is found that the vessel was in fact seen, and her side-lights noted, though mistakenly, and even her foresail visible, as the master of the steamer says it was, I do not see that the torch would have added any thing to the knowledge which, fortunately for the libellants, the steamer's people already had of the position of the schooner. I shall not, therefore, divide the damage; for I find the first and only efficient mistake was committed by the steamer.

On the question of damages, nearly all the evidence comes from the libellants. They estimate their losses in their libel at \$2,000 for the vessel, \$85 for the cargo, and for clothing, &c., \$300. The testimony goes to confirm these valuations, excepting that perhaps some allowance ought to be made for wear and tear of the schooner. She was very old, and had cost, within a year or so, \$1,200; and repairs had been put upon her, which, if they were all supposed to add to her value to the full amount, would bring her cost above \$2,000. But I suppose a part of these must be set down to current expenses necessary to keep the vessel going from year to year. Making some allowance for this, and, on the other side, giving something for delay of payment, I assess the damages at \$2,140, of which \$250 is for clothes and other effects of the master and crew.

Decree for libellants for \$2,140 and costs.

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APRIL, 1873.

The practice of procuring creditors of a bankrupt, who have small privileged debts for wages, to prove their debts at the first meeting, and vote for assignee, is disapproved.

The fee of the register, for taking and certifying a deposition in proof of debt, is one dollar.

If rule 80 of the general orders be construed to give more than one dollar for such deposition, it is *ultra vires*; because the bankrupt act, § 47, fixes the amount by reference to the fee-bill of 1858, and the supreme court have power to diminish any fees fixed by the statute, but not to increase them.

The fee of one dollar is a charge on the fund.

A fee for a letter or power of attorney by a creditor is not a charge on the fund.

BANKRUPTCY. — COSTS. — The bankrupt carried on a very large retail business in three shops in Boston, and hired many girls to wait on his customers. When he failed, he owed them various sums, from less than a dollar to ten dollars. Before the first meeting of creditors was held, certain persons, who wished to use the votes of the girls, procured their debts to be proved in due form before a register. Upon each proof was a certificate by that officer that the fees paid by the creditor amounted to one dollar and twenty-five cents, for which there was a priority of payment, under sect. 28 of the bankrupt act. The several creditors had not in fact paid the fees; but they gave orders to the register to receive them from the assignees, who submitted the question, with a written explanation by the register, to the decision of the judge.

LOWELL, J. After the first meeting, a motion was made to reject these proofs, on the ground that they were procured for the purpose of influencing the proceedings in the choice of the assignee. As the evidence was that the debts were just and valid, and had not been transferred, but were proved in the name and on behalf of the creditors, I could not interfere with their rights to prove them through any attorney they might choose to name, although he might be the bankrupt, or might be acting in the bankrupt's interest. All I could do was to refuse to confirm an assignee who might be chosen in that way, which, so far

Re Houghton.

as the purpose for which the debts were proved at the first meeting, rather than afterwards, is concerned, was very much the same thing. That action on my part will tend, I hope, to discountenance the practice of bringing in the preferred creditors, who, in most cases, have no real interest in the choice of assignee, to vote for the bankrupt's friend. It would, perhaps, be a wise rule that such creditors, when sure of eventual payment in full, should have no further right than to object to a dishonest assignee; but in the present state of the law I could not impose such a rule upon the parties. I suggested to the assignees at the hearing that they could save expense to the estate by paying these small preferred debts without regular proof, if they were so fully assured of the facts that there would be no risk of mistake, or if the trade creditors should authorize it; and I understand they have adopted this course, to the great advantage of the general creditors. In the mean time, I repeat my disapprobation of the course that was pursued before the first meeting, and suggest to registers that they will inform persons who may attempt to choose an assignee in such a way that it will be useless. If I could tax the costs against the bankrupt, or whoever it was that induced these creditors to prove, I should be happy to do so; but I do not see that any discretion is left me. Rule 30 of the supreme court, and sect. 28 of the statutes, seem to me to intend that, if the creditor insists upon his exact right, he may have the cost of proving his debt charged upon the assets.

Then, what is the fee for this service? I am informed that it has usually been charged in this district, since the new rules were passed, and perhaps before, at one dollar. This is on the theory that the affidavit is either a deposition or an examination, and that whichever it is to be called, it is virtually a deposition; and by the fee-bill of 1853, 10 Stats. 167, the charge is twenty cents a folio, which makes on an average length of depositions seventy-five cents; and that by rule 30, twenty-five cents may be added for certifying the proof as correct in form. I have had occasion to learn that in one judicial district the registers, or some of them, charge two dollars and a quarter for every affidavit; and this most exorbitant charge is one great cause of complaint against the operation of the law. It is defended on the ground that rule

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30 adds to the twenty cents a folio one dollar for each hour actually engaged; and the registers who make the charge assume that they constructively employ an hour in making out an affidavit, when they know very well that they actually do not. But if they could show in any case that they had used so much time, a further objection would remain, that the bankrupt act prescribes, in sect. 47, the fee for depositions to be that already established by the fee-bill; and in two sections the supreme court are authorized to diminish the fees mentioned in the statute, but nowhere are they given the power to increase them. If, therefore, the rule were intended to apply to these affidavits, which I cannot admit, the fee could not be enlarged by it.

My only doubt is whether the whole fee of a register in such a case is not twenty-five cents; but upon careful examination and reflection I am of opinion that if a creditor offers his affidavit in due form, the register is to have twenty-five cents for examining and certifying it; but if the register really prepare the paper, he may charge one dollar, as for a deposition.

It remains only to say, that, so far as any part of the fee is for a power or letter of attorney, it is not a charge on the assets, because it is merely a matter for the convenience of the particular creditor. Assignees and registers will take notice that no further or other fees are to be charged than as above allowed. The dollar is, in my opinion, too much; but I do not see my way to refusing it.

Re M. T. BATCHELDER. — Ex parte D. W. LUCE.

MAY, 1873.

A., the owner of certain goods, deposited them with a warehouseman in the name of B., who was A.'s broker, and afterwards sold them to B., gave him a receipted bill of parcels, and took his note for the price. *Held*, that no further delivery of the goods was necessary, and that A.'s lien as vendor was lost.

Another parcel of goods was warehoused in the name of C., another broker, and was sold by A., the owner, to B., and a receipted bill given, and a negotiable promissory note taken for the price, which note was signed by B., and indorsed by D. for B.'s accommodation. B. and D. failed before the note became due. Notice of the

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sale had been given to C., the broker, but not to the warehouseman. *Held*, 1. The possession was not changed, and the lien of A. revived on the failure of B. and D. 2. As affecting the lien it was immaterial whether the note was taken as payment or security. 3. A. was not bound to surrender the note, but might require the goods to be sold, and indorse the amount of the proceeds upon the note, and prove against the estates of B. and D. for the balance.

BANKRUPTCY. — SALE. — VENDOR'S LIEN. — The petitioner, Luce, sold several lots of pickled salmon to Batchelder, at sundry times, and took his notes for the price, payable in four months from their several dates, indorsed by a third person. Both the buyer and the indorser failed, and became bankrupt, leaving the notes unpaid; and the petitioner proved for the full amount of the notes at the first meeting of Batchelder's creditors. He soon after filed his petition, averring that his proof was made unadvisedly, in the absence of his counsel, and that he was now informed that he had a lien on such of the salmon as remained in warehouse, and prayed that the goods might be sold, and the proceeds be applied to the payment of his debt, and that his proof should be so modified as to stand good only for any balance that might remain due him, after crediting the proceeds of sale. The parties agreed, in writing, to a statement of facts. Sixty barrels of the salmon were put by Luce into the hands of Beaman Brothers, brokers, for sale, and were by them stored in the warehouse of Lombard & Co., in their own names. When this lot was sold to Batchelder, a receipted bill of the same was given him, and Beaman Brothers were notified by Luce that the sale had been made, and were ordered to deliver the sixty barrels to Batchelder; but the latter never called upon Beaman Brothers, nor upon Lombard, the warehouseman, for the goods, or any part of them, and no transfer of them was made on Lombard's books. There were three other lots, all of which were stored with Lombard in the name of Batchelder, who was a broker as well as a dealer, and while so stored were bought by him; and part of two of these lots were delivered, from time to time, by Lombard to Batchelder before his failure.

No notice was given by Luce to Beaman Brothers, nor to Lombard, of his intention to claim a lien, until three months after the failure of Batchelder, and after protracted negotiations for a

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settlement with him had resulted in nothing. The notes which Luce took for the price of all these goods were pledged by him to a bank as collateral security for a loan ; but it was agreed at the argument that they were afterwards taken up by Luce, and were now held by him. He did not offer to cancel or surrender the notes, intending to prove them against the indorser's estate in bankruptcy. By consent of both parties an order was passed, a few days before the hearing, authorizing a sale of the goods, the proceeds to be held subject to the further order of the court.

C. G. Keyes, for Luce.

J. B. Harris, for the assignee.

LOWELL, J. It seems equally evident that Luce retains a vendor's lien upon the sixty barrels, and that he has none upon the other lots. If goods at the time of their sale are in the possession of a warehouseman or other bailee of the vendor, the lien is not lost by a simple notice to the bailee of the sale ; but he must do some act, or come under some obligation, by which he is to be considered as having changed his relation to the vendor, and transferred his allegiance, so to say, to the vendee. Notice may be enough to put him on his guard, and to render him liable to an action if he does any thing inconsistent with the notice ; and a notice silently received may be evidence of acquiescence, and it may even be conclusive evidence thereof, by way of estoppel, if third persons have been misled ; but, as between the vendor and vendee, I understand that the possession is not changed until the warehouseman has in some way acknowledged the change, and has become the agent of the vendee. In the analogous law of stoppage *in transitu*, the carrier who receives goods very often has notice that the consignee has bought them, and is, in fact, their owner, and he is notified and directed to deliver to the vendee ; but until he has either delivered them, or changed his relation in some way so as to become the exclusive agent of the vendee, they may be stopped, if the occasion arises. In short, such an order is revocable in the case of the failure of the vendee, unless it has been acted on.

This case, however, does not show that even notice was given to the warehouseman. The notice was to the brokers in whose name the goods were stored, which is one step further off.

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Such a notice could not be held to work a constructive change of possession: *McEwan v. Smith*, 2 H. of L. Cases, 309. See, too, *Dixon v. Yates*, 5 B. & Ad. 313; *Whitehead v. Anderson*, 9 M. & W. 518; *Griffiths v. Perry*, 1 Ellis & Ellis, 680; *Donath v. Bromhead*, 7 Barr, 301. It was argued with much earnestness that, after a payment for the goods by note, the right was lost, or rather had nothing to rest on. This would be so, if the debt were really paid; but when it turns out that what was accepted as payment does not bear the fruit of payment, the law does not insist on taking the word for the thing. The cases are all one way on this point. The special doctrine of the courts of Massachusetts which was insisted on, that a negotiable note is presumed to be payment, unless the contrary is proved, is of no consequence, because it is admitted in many cases decided by other courts that the notes in those cases were expressly received as payment; but the vendor has been permitted to assert his lien. It is enough to cite, upon this point, *Arnold v. Delano*, 4 Cush. 83; and *Mohr v. Boston & Albany R. R. Co.*, 106 Mass. 67.

The only remaining question as to this lot of sixty barrels is, whether the petitioner can prove for the remainder of his note after giving credit for what he may receive by the sale of the goods. One of the notes which he holds was given for the sixty barrels, and for one of the other lots which was sold at the same time, though for a distinct price, and was included in one receipted bill. This note was indorsed by Brown, Chickering, & Co., who are in bankruptcy. So far as appears, the indorsement was given for the accommodation of Batchelder. It was not insisted that the sale was so far one and indivisible that a delivery of part of the fifty-barrel lot ended the lien on the sixty-barrel lot; and the facts do not seem to admit of any such ruling. I therefore pass that point by. The argument is, that if the debt and lien are to be revived, the note must be given up and cancelled. I do not see any necessity for such action. When a suit is brought for goods sold, no doubt the vendor, before he can have judgment, must give up the vendee's note which he holds for the same debt; but when the note has been dishonored, and is in the possession of the vendor, I do not see what difference it

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makes in bankruptcy whether the money received from the realization of the lien be indorsed on the note or credited on the original debt, and whether the proof is made on the one or the other. Indeed, I think it more regular that the proof should be made on the note, for that really represents the debt. Again, I know of no reason why the vendor is obliged to lose any dividend he may receive from the indorser. In such a case it seems consistent with the rights of the parties to hold that the lien is held for the security of the note; else the vendor is put to the election between different securities, both of which he holds. Suppose the indorser to be a surety, as he is here, and to be nearly solvent, has not he or his assignee the right to require the vendor to obtain what he can out of his lien, and exonerate the surety's estate to that extent? I see no reason why the petitioner need surrender any of his security.

No reason has been assigned why the proof may not now be modified, as having been made under a mistake. In one case in Massachusetts a creditor was not permitted to change his proof after voting for the assignee and for the discharge of the debtor, though ignorantly. That was upon the ground that the rights of other creditors had been interfered with, or modified by the vote: *New Bedford Inst. v. Fairhaven Bank*, 9 Allen, 175. In most cases no such effect could fairly be attributed to a mere vote for assignee, and none is shown here. The other lots were already warehoused in the name of Batchelder when the sale was made. No notice or attornment was necessary or possible. There was nothing in the books of Lombard to show that Batchelder was an agent: his possession was Batchelder's; and when the latter bought the goods, and took delivery of a receipted bill, the possession and property coincided, and the lien was gone. It is the simple case of the vendee being in possession of the goods when he buys them.

I understand that the goods have depreciated in value in the lapse of time while the ownership was uncertain, and that they will not now bring enough to pay in full that part of the note which represents their price, and which is definitely shown and agreed to be \$960.

The other lots were already standing in the name of the buyer,

Re Gilley.

at the time of his purchase, and no further act was necessary or possible to complete the transfer than to receipt the bill.

The order is : That the sixty barrels be sold under the direction of the petitioner and assignee, as heretofore ordered, and the proceeds of sale, not exceeding the original price and any interest that may have accrued thereon, be paid to the petitioner and indorsed on the note, and that the proof heretofore made on said note in bankruptcy be reduced by the amount so indorsed. If the whole debt is paid, the proof to be cancelled, and if a surplus remains, it is to be held by the assignee.

The remaining goods mentioned in the petition, or their proceeds, are to be transferred to the assignee, to be by him disposed of as assets in the bankruptcy.

Re J. H. GILLEY.

MAY, 1878.

The first meeting of creditors in a proceeding in bankruptcy should be kept open for at least one hour.

Where such a meeting was warned for ten o'clock, and certain creditors appeared and voted for assignees, and the register declared the polls closed at half-past ten, and other creditors appeared and voted before eleven o'clock, — *Held*, the register should have counted these last votes.

BANKRUPTCY. — MEETING. — The register certified that the first meeting of creditors was duly notified to be held at his office, at ten o'clock in the forenoon of a certain day. Several creditors appeared and proved their debts, and voted for assignee. At half-past ten o'clock, all creditors present having voted, and no intimation from any one having been made that other creditors were expected, the register declared one of the two candidates who had been voted for to be elected. Thereupon the creditors left the office, and, in about ten minutes, other creditors arrived and proved claims, and filed votes sufficient to change the result and elect the other candidate. The register declined to count these votes, and decided, subject to the opinion of the court, that the former candidate was elected.

Re Gilley.

The case was submitted without argument.

LOWELL, J. It has been the practice, under the insolvent law of Massachusetts, and under the bankrupt act, so far as I am informed, to consider that a meeting of creditors, warned for ten o'clock, is to be open for at least one hour, and as much longer as the business before the meeting may require. The register has full power of adjournment for cause; but I do not think he should close the polls under one hour in any event. This is a matter of practice which the supreme court have not found it necessary to regulate, and which need not be uniform in all the districts, but which ought to be clearly established uniformly throughout each district.

It has always been the habit in New England, and probably in most of the States, to require a justice of the peace, or other magistrate or commissioner, sitting in civil causes, to give an hour for the parties to appear: *United States v. Rundlett*, 2 Curtis, C. C. 41; *Niles v. Hancock*, 8 Met. 568; *Hobbs v. Fogg*, 6 Gray, 251. See *Hunt v. Wickwire*, 10 Wend. 102; *Shufelt v. Cramer*, 20 Johns. 309. It is a common saying, and a true one, that "it is ten o'clock until it is eleven." The rule is by no means confined to magistrates. It is said in *Shufelt v. Cramer* to apply to orders to show cause before a judge in chambers; and such has always been my practice in the many orders I have occasion to issue in motions and interlocutory matters in bankruptcy. The meeting for the surrender of a bankrupt, under the old practice in England, was always enlarged on the application of the bankrupt; and Mr. Christian says: "If the time is not enlarged, and the bankrupt does not surrender, it is the present practice of the commissioners in London to wait one hour at the least, and until they have finished all other business before them." 1 Chris. Bank. Law (2d ed.), 300. There is a general order under the new English statute of 1869, which authorizes the registrar to adjourn the first meeting for one week at the end of half an hour from the time notified, if a quorum (that is three) of the creditors have not appeared within that time. This, however, is very different from closing, within the hour, a meeting once fully entered on.

The reason for allowing a single plaintiff or defendant an hour

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to meet his adversary, applies still more strongly to a general meeting of creditors coming from various places, and liable to more numerous chances of delay, and having a right to suppose that the business of such a meeting must occupy a considerable time. I am of opinion, therefore, that the practice is, and should be, that the first meeting of creditors lasts for at least one hour, and that the votes which were rejected in this case were seasonably offered, and should have been counted. There is no objection to the register's announcing the state of the polls at any time, or even closing them provisionally, with the understanding that they will be opened again if creditors appear within the hour.

It may be said that, the election having been irregular, neither candidate ought to be held to be duly chosen, but that a new election should be ordered. There would be much force in this argument in many cases; but I understand there is nothing in the circumstances of this to require the trouble and expense of another meeting to be incurred.

I appoint A. W. Pope assignee in this cause, he being the person chosen, if the votes of all the creditors are counted.

Re W. F. WHEELER. — Ex parte W. T. CARTER & AL.

MAY, 1878.

A., doing business in Worcester, Mass., made a contract with B.'s agent in New York (B. living in Philadelphia) to buy a large quantity of iron, deliverable in monthly instalments, on credit. The contract was subject to B.'s ratification. A day or two afterwards A. called on B., who told him he had received the order and entered it on his books. The parties afterwards corresponded about the contract, as subsisting. *Held*, there was sufficient evidence of ratification.

Before the time came for delivering the first lot of iron under this contract, A. failed, and notified his creditors that he could only pay twenty-five per cent of the amount of his debts. At the meeting of creditors at which this offer was made, C. told B.'s agent that he would take the iron on A.'s behalf; but he did not offer to pay cash for it. *Held*, B. was not bound to accept this offer.

Afterwards B.'s agent, with authority, wrote A. that B. would not deliver the iron unless his old debt were paid. A. took no notice of this letter, and afterwards went into bankruptcy. Neither A. nor his assignees in bankruptcy ever offered to pay

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cash for the iron, or demanded its delivery ; and there was no evidence that they were ever able or prepared to pay for it. *Held*, the letter of B.'s agent was not, under these circumstances, such a repudiation of the contract as would authorize A.'s assignees to set off the value of the contract against B.'s debt provable in bankruptcy.

BANKRUPTCY. — SET-OFF. — SALE. — The bankrupt was a manufacturer of iron at Worcester, Mass., and bought large quantities of pig-iron of the firm of W. T. Carter & Co., of Philadelphia. At the time of his failure he owed them a balance, represented by notes and accounts, amounting to about \$13,000, which they offered for proof against the estate. The assignees claimed a set-off for damages, arising out of the alleged breach of a contract by these creditors to sell the bankrupt five hundred tons of iron. The evidence was, that, on the 25th January, 1872, John H. Thompson, of New York, an iron broker, agreed, on the part of Carter & Co., to sell to Wheeler five hundred tons of Coleraine pig-iron, deliverable in lots of one hundred tons at Hoboken, in New Jersey, to be shipped thence to Worcester, by way of Norwich, on the twenty-fifth days of February and March, the twentieth days of April and May, and the fifteenth day of June, respectively, on credit. Thompson made a memorandum of the sale, which was agreed to be sufficient to comply with the statute of frauds, if he was authorized to make it. The terms of his agency were, that he should sell iron for the plaintiffs, subject to their approval. He at once sent them notice of the sale ; he testified that he did not think he had ever received any notice of its acceptance. One of the plaintiffs testified that it had never been formally accepted. Wheeler deposed that he saw Mr. Carter a day or two after the sale, and Carter said it had been received and entered on their books.

Towards the middle of February, and before the thirteenth, Wheeler failed, and called a meeting of his creditors, which was held at Worcester on the fifteenth, when he made an offer of twenty-five cents on the dollar in settlement of his debts. Thompson attended this meeting on behalf of the plaintiffs, and refused this offer. While there, another creditor, friendly to Wheeler, offered to take, on Wheeler's account, the iron which was to be delivered under the contract, and to be personally responsible for

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the price. Thompson refused to send it to him unless he would become answerable for the old debt; and at the same interview he told Wheeler that he must pay cash if he took the five hundred tons. Letters passed between the parties which show that the plaintiffs were very much dissatisfied with the statement of Wheeler's affairs. On the 19th of February, Thompson wrote Carter & Co., among other things: "Mr. Wheeler says he will be able to take the five hundred tons of iron at the periods agreed upon, and I have told him if he does so he will have to pay *cash* for it, as the iron is delivered at Hoboken." On the 23d of February, Thompson wrote to Wheeler, among other things, that Carter & Co. positively refused to let him have any part of the five hundred tons, unless the iron already had by him should be paid for in full. Afterwards, in March or April, Wheeler saw Carter & Co. in Philadelphia, and they offered, as he testified, to make a considerable allowance for this contract, as part of an arrangement for settling the old debt. But the negotiation failed.

Wheeler petitioned for adjudication of bankruptcy April 12, 1872. There was no evidence, excepting as above given, that either he or his assignees had offered to take or pay for the iron, or that any thing further had been said or done about it. Iron rose largely in price after January 25; and it was agreed that, if the plaintiffs were liable in set-off or mutual credit, the amount of damages was \$5,500.

T. L. Nelson, for the assignees. There is sufficient evidence that the contract was ratified by Carter & Co., and this is equivalent to previous authority: *Browne*, Stat. Frauds (2d ed.), 370. The letters prove this: *Browne*, §§ 346, 347, 357, 359; *Coddington v. Goddard*, 16 Gray, 436; *Blackburn on Sales*, 115.

We admit that, upon Wheeler's insolvency, the sellers might withhold the goods until they received the price. But as they declared beforehand that they would not deliver, it was not necessary for Wheeler or his assignees to tender the price. A tender need not be made, if it would be fruitless: *Chitty on Contracts* (7th Am. ed.), 448; *Cook v. Doggett*, 2 Allen, 439.

P. Emory Aldrich, for the creditors. We deny that any contract was made. But, if made, Carter & Co. could retain the

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iron until paid for, after the failure of Wheeler had annulled the agreement for a credit: *Arnold v. Delano*, 4 Cush. 38; *Bloxam v. Sanders*, 4 B. & C. 941; *Bloxam v. Morley*, id. 951. In *Bloxam v. Sanders*, Bayley, J., says that the seller's right is something more than a lien, and that payment or tender of the price is a condition precedent to the buyer's right of possession. See *Tooke v. Hollingworth*, 5 T. R. 215. Carter & Co. never repudiated the contract. They were never called on to fulfil it. There is no sufficient evidence that either Wheeler or his assignees were ever in a position to fulfil their part, or ever intended or offered to do so; and it is impossible to say that Carter & Co. would not have performed their part if duly requested.

LOWELL, J. It is admitted that a contract was entered into between Wheeler and Thompson, and a sufficient memorandum made of it, if the bargain was ever ratified by Thompson's principals. It appears that Thompson wrote them that Wheeler would call on them in Philadelphia; and that he did call, and they told him the order was received, and entered on their books. This is a ratification; because they would have no occasion to enter on their books a rejected offer. But, besides this, there is ample evidence that both parties considered it a binding and existing contract in February.

The real question in the case is, whether there has been a breach on the part of Carter & Co. It is agreed that, upon the failure of the buyer, they had the right to withhold the goods until the price should be paid or offered; and that if cash were offered or tendered, or if the want of tender was excused or dispensed with, and the cash was ready for them, they must go on and deliver the iron. The point of controversy is, whether an offer was made, or if not, whether it was waived. The assignees contend that, before the time for the first delivery came, the sellers rescinded the contract, and so left nothing for the buyer to do but to recover his damages. It was decided in the queen's bench in England, in 1853, that if one party to an executory contract repudiates it before the time of performance arrives, the other party may have his action immediately: *Hochster v. De La Tour*, 2 Ellis & B. 678. This was thought, at the time, to be a novel doctrine; but it has been followed by the other courts:

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The Danube, &c. Co. v. Xenos, 13 C. B. N. s. 825; *Frost v. Knight*, L. R. 5 Exch. 322; s. c. in error, L. R. 7 Exch. 111. The leading case certainly commends itself to the judgment. A courier was engaged in April to serve for three months from the first of June; and in May the employer wrote him that he should not make the journey, nor need his services. The courier thereupon engaged with another traveller; but the new service was to begin at a later day than the first of June, and he sued the former employer in May for the value of the time thus lost, and it was held he might recover his damages. The case was classed with those in which the promisor has incapacitated himself from keeping his engagement; as if, having promised to marry A., he marries B. before the time has come for fulfilling his engagement with A., an action lies at once by the latter.

But it was found that these executory breaches, so to say, could not, in fairness, be made to apply in all cases. In *Avery v. Bowden* and *Reid v. Hoskins*, which were so much alike that they were argued and decided together in the court of error, the facts were, that a charterer was bound to furnish a cargo of grain at Odessa, to be shipped to England, at a time when war between Russia and Great Britain was imminent. The charterer's agent at Odessa notified the master of the vessel, immediately on his arrival at the port, and before he was bound to furnish a cargo, that he should not furnish it; but the master insisted that he would wait during the time allowed by the contract; and, before that time had expired, war was declared, and performance of the contract became illegal. It was held that no action could be maintained by the ship-owner: 5 Ellis & B. 714, 729; 6 id. 953. Upon a review of the decisions above referred to by Cockburn, C. J., in a recent case, he finds the law of England to be, that, when the promisor has announced his intention not to perform the contract, the promisee may treat the notice as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible; and in this case he keeps the contract alive for the benefit of both parties, and remains liable to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, but also to take advantage of any supervening cir-

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cumstances which may justify him in declining to complete it; or he may treat the notice as a breach, and have his action at once: *Frost v. Knight*, L. R. 7 Exch. 112, 113. In Benjamin on Sales, p. 424, the English rule is stated thus: "A mere assertion that the party will be unable, or will refuse, to perform his contract, is not sufficient: it must be a distinct and unequivocal, absolute refusal to keep the promise, and must be treated and acted on as such by the party to whom the promise was made."

I have given the result of these cases, because they go farther than any that I have seen in this country to support the contention of the assignees; and I recognize a certain equity in their claim, which I should be not unwilling to make available, if the law would permit it. But it seems impossible to bring it under even the most advanced of the decisions.

Wheeler had broken his implied obligation to keep his credit good, and was notoriously and deeply insolvent, when the letter of the 23d of February, which is said to be, or to announce, the breach of contract by Carter & Co., was written. There is no satisfactory evidence that he or his assignees have since, at any time, been able or willing to carry out the contract which the law substituted for the original contract, that is, to pay cash on delivery, or that they ever told Carter they were ready. There was some talk about it at the meeting of the creditors at Worcester in February; but no offer was made which Carter & Co. were bound to accept, because the offer was not to pay cash. Judging from the evidence, the letter of Thompson to his principals, in which he writes that Mr. Wheeler says he shall be able to take the iron, refers to this conversation; for there does not appear to have been any other, nor any letters from Wheeler. I consider that the whole meaning of that letter, with the other evidence, is this: that Wheeler hoped to settle with his creditors, and go on in his business, and take the benefit of this valuable contract. But he never was in a position to do so. I agree that, in the letter of 23d February, Thompson, acting for the plaintiffs, and by their authority, undertook to annex a condition to the delivery of the iron, which the law did not impose nor permit; but I regard this as an offer, which, under the circumstances, Wheeler should have taken some notice of, if he

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intended to insist on the renewal of the contract, or to hold it to be definitely renounced by Carter. This letter could not have reached him at Worcester until the day before the first lot of iron should have been paid for at Hoboken; and there is no evidence that it affected his conduct in any way. I think it is to be considered as part of an unfinished negotiation to renew the contract, and it certainly is not an unconditional refusal to perform it. We must remember, among the other facts, that it was not at this time apparent how advantageous the contract would be for the buyer.

I feel myself constrained, therefore, to decide against the assignees, for several reasons: 1. The sellers did not make an absolute and unequivocal renunciation of the contract. 2. The buyer did not accept or act upon the notice as being such a renunciation, or inform the sellers that he took it so. 3. It is not proved that the buyer was able and willing to perform his part of the contract. 4. He never notified such readiness. If the case turned merely on the consideration whether the one party or the other was bound to take the first step to reinstate the suspended contract, the judgment ought to be the same. The contract was suspended by the misfortune of Wheeler; and it was for him to give a clear and unequivocal notice of his intention to pay cash, before the sellers would be bound to manufacture the iron, or to send it to Hoboken. It cannot be that Carter & Co. must make an investment of \$16,000 on the chance of an insolvent man becoming solvent, or being able to do by the aid of others what he confessedly could not perform himself. But this is only one of several reasons why the assignees must be held not to have been put by Wheeler, and not to have put themselves, in a position to claim damages on account of this contract.

If it were proved, or could be taken for granted, that the letter prevented Wheeler from attempting to pay for the first cargo or lot of iron, which is perhaps a question of some nicety, yet it surely ought not to affect his assignees. They could not have supposed that they were expected to pay the old debt as a condition precedent to receiving the iron, and they should have made an offer, and put the other party to his election to fulfil or reject.

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I cannot think, therefore, that in any event the damages could be assessed for the whole value of the contract. But, upon the evidence before me, I decide that there has been no breach at all.

Debt admitted to proof in full.

Re F. F. HOLBROOK & CO. — Ex parte WINDHAM PROVIDENT INSTITUTION.

May, 1873.

A joint and several note, signed H. & Co., A., B., C., was given for money borrowed by the firm of H. & Co., and the three last signers were sureties. *Held*, it could be proved against the joint assets of H. & Co. in bankruptcy.

A joint and several note, signed by the three partners of H. & Co. in their individual names, and by A., B., and C., as sureties, is the joint note of all, and the several note of each of the signers, but not the joint note of the firm of H. & Co., and cannot be proved as against joint assets.

Where one partner gives security upon his separate property for a joint debt of the firm, the creditor may prove for the full amount against the joint estate of the firm in bankruptcy, without surrendering, selling, or valuing his security.

But where one partner gives such security to sureties, to indemnify them against liability for his separate debt, the separate creditor must procure the security to be applied, and prove only for the deficiency.

If the security was given by the bankrupt to a surety, the creditor must cause the security to be surrendered or applied before he proves his debt against the assets of the principal.

BANKRUPTCY.—SECURED CREDITORS.—The Windham Provident Institution for Savings, of Brattleboro', Vt., offered for proof, against the joint estate of the bankrupt firm, two notes of \$5,000 each, payable to the order of the savings-bank, on demand, with interest payable semi-annually. One note was in this form: "We jointly and severally promise," and was signed, "F. F. Holbrook & Co., F. Goodhue, S. M. Waite." Goodhue and Waite were sureties only, though this did not appear on the note. The other note was, "I promise," and was signed by the three members of the firm, in their individual names, and by three sureties. The money was borrowed for the firm, and remitted in a check payable to their order; but there was nothing on the face of the promise to show that it was a firm undertaking, or that the three last signers were sureties. There was evidence that F. F. Holbrook owned certain patents,

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which the firm were to have the exclusive right to use during the continuance of the partnership, and to buy at a fixed price ; but they did not buy them. Some time after the notes were given, F. F. Holbrook conveyed these patents to his father, who lived in Vermont, to hold as security for certain advances, and, among other things, to indemnify the sureties on the notes now offered for proof. The assignee resisted the proof, on the ground that the second note was not a firm debt, and that both notes were secured by the assignment of the patents.

H. H. Currier, for the savings-bank.

C. S. Lincoln, for the assignee.

LOWELL, J. Sect. 20 of the bankrupt act, which requires creditors who hold security upon any property of the bankrupt to procure it to be sold or valued, and its proceeds or value to be deducted from the debt before proof is made against the assets in bankruptcy, extends, I think, to a case in which an indorser, surety, or guarantor holds such security from the bankrupt, though there be no legal privity between the surety and the creditor. In equity, the creditor can compel the surety to apply the property towards the payment of the debt for which it is held ; and, if both principal and surety become bankrupt, the general creditors of neither can have the property, but it must go to the benefit of the particular creditor or creditors for whose benefit it was equitably pledged. The rule is the same, though the pledge or mortgage should be, in form, merely to indemnify the surety and not to pay the debt, because it is only by the payment that there can be indemnity ; in other words, equity implies the trust, if it is not adequately expressed. I am aware that the supreme court of Massachusetts, in very briefly reasoned cases, have admitted such debts to proof: *Meed v. Nelson*, 9 Gray, 55 ; *Prov. Institution v. Stetson*, 12 Gray, 27 ; but I do not at present see how these decisions are to be reconciled with those in which the same court have so fully and learnedly upheld the equitable doctrine above referred to : *Eastman v. Foster*, 8 Met. 19 ; *Rice v. Dewey*, 13 Gray, 47 ; *New Bedford Institution v. Fairhaven Bank*, 9 Allen, 175. These cases decide, in effect, that the surety is a sort of trustee for the creditor ; and in the last case it was held that the proof of the debt by the creditor, even through ignorance,

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discharged the security, if the rights or position of the other creditors had been in any way affected thereby. It is quite inconsistent with this doctrine to hold that the creditor can prove his debt as if he had no security, and that the guarantor or indorser can go on and convert the security for his indemnity, as if nothing had happened. The practical effect of such a rule would be, that, whenever the security is insufficient, the creditor will prove his whole debt, and take his dividend, and the surety holding the security will then pay the remainder, and indemnify himself out of the property held for the purpose, and thus defeat the statute, which requires the property to be applied first, and the balance only to be proved. If the creditor has power in equity to force the surety to apply the security, there is no legal difficulty in requiring it to be applied before the debt is proved: see *Re Jaycox*, 8 N. B. R. 241. If a trustee holds security for a considerable body or class of creditors, it may not be in the power of any one or more of the creditors less than the whole number to govern the disposition of the property. In such a case, I have permitted proof to be made by any creditors who chose to disclaim in writing all interest in the security, and to notify the trustees to that effect.

But another consideration affects the case in hand. The patent-rights which were assigned for the indemnity of the sureties were not the property of the firm of F. F. Holbrook & Co., but of the senior partner only. The statute only requires the property to be renounced, sold, or valued, when it is the property of the bankrupt. If the goods or estate of any third person have been pledged for the bankrupt's debt, equity does not require that the general creditors of the bankrupt should have the advantage of this security; on the contrary, the equity is that the estate of the volunteer should be exonerated. If he pays a debt of the bankrupt, he has a right to full proof against the estate; and the creditor has the same right. It is the bankrupt's debt; and whether the creditor have security by indorsements, or in any other way that has not diminished the general assets, he has a right to prove it. This has always been the rule in England, and it has been adopted by Judge Fox, in an able opinion, to which I am happy to be able to refer: *Re Cram*, 1 N. B. R. 504; this rule

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applies to partnerships when the estate of one partner has been pledged or mortgaged for a debt of the firm, and for the same reason, that the full proof should be made against that estate which is the principal debtor: *Story, Partn. § 389; Ex parte Parr*, 1 Rose, 76; *Ex parte Plummer*, 1 Phillips, 56; *Wilder v. Keeler*, 3 Paige, 167; *Besley v. Lawrence*, 11 id. 581; *Ex parte Peacock*, 2 Glyn & J. 27.

The patents, being the property of Holbrook, may be disregarded by the bank in proving their debt, in so far as it is a joint or firm debt, which is a disputed question in respect to the second note. The first note is signed in the firm name, and is admitted to be the joint and several promise of the firm, considered as one legal entity, and of the three sureties; and it was agreed that a suit might be maintained against the firm only, or the firm and the three sureties, or against each surety, but probably not against each member of the firm separately. The second note is signed by six individuals, of whom three are the three members of the firm of F. F. Holbrook & Co. This is the note of all six of the signers, or of any one of them, but not of any two, three, four, or five. At law, no suit could be maintained against the firm upon this instrument. This consideration is not conclusive of the question whether it can be proved against the joint estate in bankruptcy, because the bankrupt court acts upon equitable rules. But I am not aware that in equity this note would bind the firm jointly. A learned author, in treating of the bankruptcy of partners, says: "Separate debts are those for which the creditor can have his remedy at law, not against the whole firm, but against that partner only who contracted them; joint debts are those for which an action, if brought, must be brought against all the partners constituting the firm." Collyer, *Partn.* (5th Am. ed.) § 906. It is clear that the partners are severally liable; and if it happened, as it not seldom does happen in bankruptcy, that the separate promises turned out to be better than the joint promise, how could I refuse the bank leave to make their proof against the several estates which are bound by the very terms of the note? Certainly it cannot be denied that the bank has a right to the benefit of the separate promises, which they have taken pains to secure. Have they, then, an election to prove against the joint

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estate? I think not. A plausible argument may be made in favor of such a right, in this way: The three last signers of the note are sureties of the three first signers, and, if they had paid the debt, could have sued the three partners jointly; indeed, must have sued them jointly; and, if the partners afterwards became bankrupt, could prove against their joint estate. It usually makes no difference in what order proof is made; and, to avoid circuitry, the creditor may prove in the same mode and with the same effect as the surety might. I am much inclined to think that the rights of the sureties are correctly stated in this argument. Still it may admit of question whether the bankruptcy of the principals does not qualify the right of the sureties. By sect. 19 of the statute, a surety paying the debt is entitled to prove it, or, if the creditor has proved it, to stand in his place in respect to the dividends. It seems, therefore, that the surety is subrogated to the rights of the creditor, and not *vice versa*; and I should doubt whether, by paying after the bankruptcy, the surety acquires any thing more than the right of proof that the creditor had at the date of the bankruptcy. But I have not satisfied my mind on this point, which can be left until it comes up for judgment. If the sureties would have the right to prove against the joint estate, this would arise out of a contract which these creditors are no parties to, namely, the contract of suretyship; the implied undertaking which arises out of the relations of the principals and sureties to each other, and on which no action arises until the creditor has been paid. It is not, therefore, like the case we were first considering, of property of the bankrupt pledged to the surety, which in equity inures to the benefit of the creditor, but of an incident to the relations of the bankrupt and surety between themselves, with which the creditor has no connection. .

My decision, therefore, is, that the first note is to be admitted as a debt against the joint estate for the amount of \$5,160, and the second note in full against the separate estates of Thomas B. Everett and J. B. Small; but not against the separate estate of Holbrook, until the security has been valued or disposed of.

Order accordingly.

Re Low & Son. — Ex parte Baker.

Re JOHN LOW & SON. — Ex parte J. BAKER & AL.

JUNE, 1878.

Seamen engaged and serving for a fishing voyage have a lien on the fish for their wages.

Where the owners of a fishing-vessel became bankrupt, and afterwards the vessel arrived, and the assignees received the proceeds of sales of the fish, — *Held*, they took them subject to the lien of the seamen.

Where the assignees sold a fishing-vessel for its full value, without taking into account any secret liens, and the purchasers were afterwards obliged, by a libel against the vessel, to pay wages of some of the fishermen for the preceding voyage, — *Held*, the purchasers of the vessel were subrogated to the lien of the seamen against the fish and their proceeds, and might recover of the assignees such proportion of those proceeds as the wages so paid bore to the whole amount of wages.

In ascertaining the net proceeds of the fish, the assignees were permitted to deduct the necessary expense of recovering a part of the value from an adverse claimant, who had taken the fish by replevin from the possession of the assignees.

FISHING VOYAGE. — LIEN. — Petition by mortgagees of the fishing-schooner Florence Reed, of Gloucester, praying that the assignees in this case might be ordered to pay out to them a part of the money received for the sale of a fare of fish. The case was, that John Low & Son, the bankrupts, were in possession of the vessel, and sent her on a voyage to the Grand Banks; and, before her return, the petition in bankruptcy was filed, and the marshal took possession of the schooner and her catch, and turned them over to the assignees, who sold a part of the fish and received the proceeds. The remaining fish were replevied by a writ out of a State court by Alfred & Sylvanus Low, who claimed title through an alleged sale of the catch; but the court decided against them, and ordered a return of the goods, and the assignees received their value from the sureties on the replevin bond. In the mean time, the assignees sold the equity of redemption in the schooner to the petitioners for \$350; and afterwards the seamen proceeded against the vessel in admiralty for their wages, and recovered a decree, which the petitioners satisfied. The petition alleged that the fish, or their proceeds in the hands of the assignees, were subject to a lien for the wages, and that the petitioners ought to be subrogated to the rights of the seamen. The contract between

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the bankrupts and the fishermen were for shares of the fish caught by them respectively.

J. C. Dodge & F. W. Choate, for the petitioners, cited to the point that there was a lien, *Knight v. Parsons*, 1 Sprague, 279; *Two Hundred & Ninety Barrels of Oil*, id. 475; *The Antelope*, 1 Lowell, 130; and on the doctrine of subrogation, Story, Eq. §§ 499, 633, 634; *Wall v. Mason*, 102 Mass. 313; *The William M. Safford*, Lush. 69; *The Tangier*, ante, 5.

S. B. Ives, for the assignees.

LOWELL, J. Although the fisherman is in many respects like a hired seaman, yet he has a right to say that the proceeds of the fish shall be appropriated to his payment; in other words, he has an equitable lien on the fish, subject, of course, to the absolute right of a solvent owner to convey and give an indefeasible title to the purchaser. It is very like the lien of seamen on the freight, which does not oblige a freighter to see to the application of his money; but, until a payment has been made, the lien may be enforced in the admiralty: *The Antelope*, 1 Lowell, 130. A court of equity would, if necessary, require the assignees of a bankrupt to keep a separate account of the catch of a voyage coming into their hands, and to pay out of it the several proportions due to the master and men. The jurisdiction is likewise vested in the court of bankruptcy, and does not, in my opinion, require a regular bill to be filed; and the parties here have not sought to interpose any technical objection.

The remaining question is, whether the petitioners, having been obliged to pay the wages or shares in order to save the vessel, are subrogated to the lien of the seamen against the fish. The equitable doctrine of subrogation, or substitution, is applied in a great variety of cases, and upon the broad ground that the money or property of one man has gone to pay the debt of another, and that in such case the person paying shall be entitled, in equity, to an assignment of all the securities of the creditor. See *The Tangier*, ante, 5. This is a right which the creditor cannot defeat; which nothing, indeed, can defeat but intervening equities. It has very often been applied for the benefit of purchasers. One of the simplest and most common cases is where a parcel of land is subject to an incumbrance, and part of it is

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sold for a full price, as being clear of incumbrances. The vendee can, in equity, require, as between himself and the vendor, the whole burden to be thrown on the part which remains unsold. That case is closely analogous to this. The difficulties which have arisen in the application of the rule, where the rights of several successive purchasers are in question, and which may depend upon a great variety of considerations, such as express or implied notice, need not engage our attention at this time, because this case presents the most elementary form of the doctrine. And the rule is worked both ways, for vendor or vendee, as the equities of their position may require. The seamen here had two securities; and, if the petitioners had bought the vessel under a contract which bound them to satisfy these debts, and the assignees had then been obliged to pay them, the latter would have the right to resort to the vessel itself, if the personal responsibility of the petitioners were inadequate or unsatisfactory; and if the petitioners, on the other hand, bought without notice, and with no allowance for secret liens, and have been obliged to pay them, they can resort to the fund which has come to the assignees, not in the mass of the bankrupt's assets, but in a distinct form, and with a charge fixed upon it for the payment of these debts. I understand it to be admitted, as matter of fact, that the vessel was bought for her full value, neither party remembering or having any regard to these liens; and the case is therefore made out. The right does not depend on the form of the bill of sale, whether a mere release or a deed with covenants; but that is only one kind of evidence. The true question is one of intent, to be gathered from all legal evidence. As the assignees have been put to expense in recovering the fund, they have a first charge upon it for their reimbursement; and this may prevent the petitioners recovering the full amount of their payments. The prayer of the petition is, that the assignees be ordered to pay over such proportion of the net proceeds received by them from the fish and from the replevin bond, as the shares of the fishermen who have been paid by the petitioners bears to the whole sum so received. Taking net proceeds to mean such as remain after deducting all necessary charges, including those of the replevin suit, the prayer is granted.

UNITED STATES v. J. H. BROWN.

JULY, 1873.

A mate of a whaling-ship was indicted for beating and wounding one of the crew, more than two years before the date of the indictment. *Held*, the prosecution was barred by the statute of limitations of 30th April, 1790, 1 Stats. 119, notwithstanding the defendant had been absent from the United States during the whole of the two years after the offence was committed.

The statute of 28th February, 1839, § 4, 5 Stats. 322, extending the time for suits and prosecutions for penalties to five years, does not apply to indictments for crimes which may be punished by imprisonment.

Whether it applies to any criminal prosecutions, *quære*?

In a trial upon an indictment, the defendant may take advantage of the bar of the statute of limitations, under the plea of not guilty.

THE defendant was indicted at the June term, 1873, for beating and wounding, on the high seas, one of the crew of an American vessel, the defendant being the first officer of the vessel. The offence was laid as having been committed in August, 1871; but the evidence was, that the real date was in August or September, 1870. At the trial, the point was reserved, whether the statute of limitations was a bar. The jury found the defendant guilty. The ship was engaged in a whaling voyage when the assault was made, and did not return to the United States until more than two years afterwards.

T. M. Stetson, for the defendant. The bar of the statute of 1790 is absolute: there is no exception of absence from the jurisdiction, unless for the purpose of avoiding arrest or prosecution. The statute of 1839 does not apply to a crime of this sort.

E. P. Nettleton, assistant district attorney, for the United States, suggested that the statute of 1839 extended the time for prosecutions to five years.

LOWELL, J. The thirty-second section of the crimes act of 30th April, 1790, 1 Stats. 119, enacts that no one shall be prosecuted, tried, or punished for any offence not capital, nor for any fine or forfeiture under any penal statute, unless the indictment or information for the same shall be found or instituted within two years from the time of committing the offence or incurring the fine or forfeiture; but this is not to extend to any person

fleeing from justice. The statute is a general one, which applies to penal laws enacted since 1790 ; and a prosecution for a fine or forfeiture includes an action of debt for a pecuniary penalty: *Adams v. Woods*, 2 Cranch, 336. It reaches this case, then, and the inquiries are: 1, whether the bar has been properly taken advantage of; 2, whether there is any exception in the statute which saves this prosecution ; and, 3, whether any later statute has modified or repealed that of 1790.

1. I have seen *dicta* that the statute of limitations must be pleaded: *Johnson v. United States*, 3 McLean, 89 ; *State v. Hussey*, 7 Iowa, 409. One of these cases came up on *habeas corpus* after sentence, and the other on demurrer ; and all that was decided in either case, was, that the statute could not be availed of in the mode adopted in that instance. In civil cases, the rule is, that the statute must be pleaded. But to this there is a well-established exception of penal actions. In those, the plaintiff must show that his action accrued within the time, because his only title arises from the prosecution of the action itself. An informer, for example, has no vested right in the penalties, but only a right to bring an action within a certain time. This is the origin of the distinction, and it has been applied to all penal actions: *Parsons v. Hunter*, 2 Sumner, 426 ; *Hodson v. Harridge*, 2 Wms. Saund. 68, notes 6 and (i) ; Hawk. P. C. b. 2, ch. 26, § 45. If, therefore, we adopt the analogy of civil pleading, we should not require a special plea in a case involving penalties.

But I do not care to rest the decision on a distinction which appears more nice than logical. I prefer to say that, in criminal cases, the plea of not guilty puts in issue the whole case on both sides: 1 Starkie, Crim. Plead. 340 ; Archbold, Crim. Plead. (17th ed.) 139 ; 1 Bishop, Crim. Proceed. § 799. It is usual to plead matters of record, such as a former conviction or acquittal ; but I doubt if even that is necessary. At all events, the statute of limitations need not be specially pleaded. See Bishop, Stat. Crimes, § 264, and cases.¹ I suppose that the *dicta* referred to merely mean that the bar of the statute is a substantive matter of defence, which must be set up at the trial, or it will be presumed to be waived, or to have been found against the defendant.

¹ Acc. *U. S. v. Cook*, 17 Wall. 179, per Clifford, J.

United States v. Brown.

2. The defendant was absent from the country during the whole of the two years, and it is said that this statute ought not to begin to run until his return. The only exception in the statute itself is of criminals fleeing from justice; and the mate of a whale-ship, who has merely continued his cruise, does not come within that description. It may have been an oversight in congress not to provide specially for offences on the high seas, where the jurisdiction of the courts and the power to arrest are not practically coextensive; but as they have omitted to enact that the statute should begin to run only when the defendant came within the limits of the country, the courts cannot supply the omission. In the first statute of limitations of civil actions there was no exception of defendants beyond seas, though there was such an exception when plaintiffs were abroad; and the courts have uniformly held, in construing that and other similar statutes, that they could not ingraft exceptions upon the act.

It was suggested in some of the cases that the plaintiff was not without remedy, because he might proceed against an absent defendant by way of outlawry; but the decisions are not really bottomed on that foundation: *Swayn v. Stephens*, Cro. Car. 383; *Hall v. Wybourn*, 2 Salk. 420; *Beckford v. Wade*, 17 Ves. 92; see *McIver v. Ragan*, 2 Wheat. 25. I am informed by a gentleman who represented the government in a similar case before Judge Sprague, that he decided it in accordance with this view.

3. The fourth section of the act of 28th February, 1839, 5 Stats. 322, has been held to extend the time for suing penalties to five years: *Stimpson v. Pond*, 2 Curtis, C. C. 502; but it has always been understood that the section applies only to civil actions. The language is not entirely clear. It is, that no suit or prosecution shall be maintained for any penalty or forfeiture, pecuniary or otherwise, unless begun within five years, provided the person of the offender, or the property liable for such penalty or forfeiture, shall, within the same period, be found within the United States, so that the proper process may be served against such person or property therefor. The words, "penalty," "offender," and "prosecution," have some savor of criminality about them: but, construing this section in connection with the third section, as Mr. Justice Curtis did in the case last above cited (that section

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being in terms confined to civil actions); and considering that the prosecution of a fine or forfeiture had been held in the case in *Cranch* to be apt words to include a civil action for a penalty, and the great difficulty there would be in bringing all criminal actions, such as piracies, &c., to be embraced within penalties, pecuniary or otherwise; I think the true construction is plain, and that a prosecution for a crime for which the defendant may be hung or imprisoned is not the prosecution for a penalty, pecuniary or otherwise. The latter are intended to refer to specific property, such as ships and goods, which are presently after mentioned as being liable, and the proviso means, that in suits for pecuniary penalties there must have been, within the five years, an opportunity for personal service on the defendant, and in suits for specific forfeitures there must have been a possibility of seizing the property, within the same period.

New trial ordered.

Re McNULTY. — Re CLEMENT.

SEPTEMBER, 1878.

By the common law of Massachusetts, a minor has not the legal capacity to make a contract of enlistment in the marine corps.

The only statute which authorizes such an enlistment is that of 12th June, 1868, 11 Stats. 818, which applies only to boys under eighteen years old, and requires the consent of their parents.

A minor over eighteen and under twenty-one years of age cannot be lawfully enlisted in the marine corps, without the consent of his parents.

Such a contract may be avoided by the minor himself, as well as by the parent, or the United States.

THESE two cases were alike in their facts, and were tried together. Two boys, eighteen years old, left their homes together, and enlisted in the marine corps, without the knowledge or consent of their parents. One of them had only a mother living. It was alleged that the boys were drunk; but the court did not examine that question. They told the enlisting officer that they were of full age, and there was no reason to suppose that he doubted their statement.

G. W. Searle, for the petitioners.

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E. P. Nettleton, assistant district attorney, for the respondent.

LOWELL, J. Until the year 1858 there was no statute expressly regulating the age, size, citizenship, or other qualifications for recruits in the marine corps. It was necessary to look to the law of the army, or to that of the navy, and the authorities were not, perhaps, entirely agreed which should be the guide. The importance of the decision, as far as minors were concerned, was this, that it was considered by many responsible authorities that boys might be enlisted in the navy, though they could not in the army, without the consent of their parents or guardians: *Com. v. Gamble*, 11 Serg. & Rawle, 93; *U. S. v. Bainbridge*, 1 Mason, 71; *U. S. v. Stewart*, Crabbe, 265. It is not, however, unimportant to observe that *U. S. v. Bainbridge*, so often cited as a decision of this point, does not decide it; because the district judge agreed to the judgment on a wholly different ground, and upon this question expressed his dissent from the reasoning and conclusions of the presiding justice. Judge Davis's dissent had equal legal force with Mr. Justice Story's affirmation, though, being a mere statement of an opinion, without reasons, it may not be of equal persuasive power on the minds of others. So the case in Crabbe is not a decision, but notes collected by the judge in preparation for a decision which became unnecessary. On the other side is the able and elaborate opinion of Shaw, C. J., giving the judgment of the supreme court of Massachusetts, that a minor could not be lawfully enlisted in the navy without the consent of his guardian: *Com. v. Downes*, 24 Pick. 227.

A few months after this last decision was made, congress took up the matter, and passed the act of 2d March, 1837, 5 Stats. 153, authorizing the enlistment of boys for the navy, between the ages of thirteen and eighteen, to serve until their majority, with the consent of their parents. This statute appears to dispose of the question. It was argued, indeed, in the cases now before me, that any one over eighteen years of age could be enlisted in the navy without consent, and that the marine corps follows the rules of the navy. But congress undoubtedly were informed that the main argument of those courts and judges who held the contract to be valid without consent was founded, almost entirely, upon the fact that the statutes provided for the enlist-

ment of boys, and were silent as to consent. When, therefore, the legislature defined the persons who should be considered boys, and required the consent of parents to their enlistment, it destroyed this argument, and left other minors to be considered as men; and thenceforward those who would maintain their power to contract for naval service, without consent, must show that they have it by the common law of the State where the contract is made. Whatever decisions there may be elsewhere, the supreme court of Massachusetts have always maintained that such a contract is not one that a minor is capable of making: *Kimball's Case*, 9 Law Reporter, 500; *Com. v. Cushing*, 11 Mass. 67; *Com. v. Downes*, 24 Pick. 227.

In this court, since the statute of 1837, the decisions have been similar. No opinion has been published; but Judge Sprague has discharged minors from the naval service who were eighteen years old, and had enlisted without consent: *Chapman's Case*, Dist. Ct. Records, vol. xlv. p. 174. The statute of 15th May, 1872, requires the written consent of parents for the enlistment of minors in the military service. The act of 12th June, 1858, 11 Stats. 318, authorizes the enlistment of boys between eleven and seventeen years old in the marine corps, with consent, to serve until they shall be twenty-one years old.

Considering all these statutes, I think it may be taken as the will of congress, that minors shall not be enlisted in any branch of the service without the consent of their parents. Such has always been the rule in the army, excepting for a short time during war. In the navy, a difference of opinion in the courts was settled by congress in favor of the necessity for consent. In the marine corps, the only statute which touches this subject requires consent. In my opinion, therefore, this contract is one not authorized by the common law, nor by any act of congress. And I have no doubt the rule is the same throughout the United States. It certainly is so in this Commonwealth. The colonel commanding who holds these recruits, submitting the case to the judgment of the court upon the law, very frankly admitted that he could not, consistently with his orders, knowingly enlist minors without consent; which shows that the executive department agrees with the courts in the construction I have put upon

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the law, or else that the government does not need or desire men between eighteen and twenty-one years old ; and in either case these enlistments are voidable by the minors themselves, or by their parents, as well as by the government, who have been misled by a false statement. One of these boys has no father, and it has been held that a mother has no claim to her son's services : *Com. v. Murray*, 4 Binney, 487 ; but the same court held that the mother is a parent, within the enlistment acts : *Com. v. Callan*, 6 Binney, 255 ; and this is the plain meaning of the acts. But that matter is unimportant, as the minor himself desires to set aside this contract. *Petition granted.*

EPHRAIM SNOW v. JOSEPH EDWARDS.

SEPTEMBER, 1873.

Courts of admiralty have power to vary their own decrees.

In the American practice, a summary rehearing, on motion, can be granted only during the term at which the decree was made.

In defaulted actions, the summary jurisdiction to rehear is limited to ten days, irrespective of terms of court, by admiralty rule 40 of the supreme court.

After the term has passed in ordinary cases, and after ten days in defaulted cases, the court can entertain a libel of review.

Decisions and *dicta* on the foregoing subjects examined.

In a libel for review by the defendant in a defaulted action, he may contradict the officer's return in that action.

REVIEW IN ADMIRALTY. — A libel for wages of the libellant's minor son on two fishing voyages was filed in December, 1871. The marshal returned personal service on the defendant, and he was defaulted ; and, after an *ex parte* hearing, a decree was rendered for the libellant Jan. 18, 1872, and execution was issued after the lapse of ten days thereafter. On the 4th of February the defendant in that suit petitioned for a stay of proceedings and a review, on affidavit that he had received no notice of the action, and had a valid defence to the merits thereof. Upon this an order to show cause was issued ; but, owing to the death of one of the proctors, nothing was done about the case until now, when the libellant moved to dismiss the petition for a rehearing.

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A. French, for the petitioner.

F. Goodwin, for the respondent.

LOWELL, J. Doubts have sometimes been expressed whether an admiralty court could vary its own decrees. But it will be found that, with the exception of two decisions in the court of appeal in prize causes, those doubts have been thrown out in cases which called for no decision of the question, and that, whenever the point itself has been passed upon, the power has been found to exist, and has been exercised.

The earliest recorded doubts, and those which have exercised the greatest influence on the minds of succeeding judges, are those of Lord Stowell, expressed in *The Vrow*, 1 Rob. 168, and *The Fortitudo*, 2 Dodson, 58, in passages often cited and variously interpreted, though they are considered by Mr. Justice Story, Judge Sprague, and Mr. Chitty, to mean that the power exists, though it should be cautiously exercised: 2 Chitty, Gen. Pr. 538; *The New England*, *infra*; *Janvrin v. Smith*, *infra*. If we turn from the *dicta* of this learned judge to his decisions, we shall find, in two cases, not so often quoted as the *dicta*, that he varied his own decrees. In *The Herstelder*, 1 Rob. 114, Sir W. Scott had condemned a Dutch vessel as prize; and, in a note at the end of the report, p. 118, we are told that the court, fifteen days afterwards, expressed great dissatisfaction that the vessel was lying in a port in Norway instead of at Plymouth, as described in the proceedings, and he ordered the register to annul the decree. This is decisive, for the jurisdiction of the court to pass on the question of prize in such circumstances was undoubted; and it was, therefore, a reversal of a valid decree. *The Fortuna*, 4 Rob. 278, seems to me an almost equally important case in this discussion. There, a final decree had been made to restore a cargo, and afterwards the captors came in and asked for an allowance for freight; and the court so ordered, although the objection was taken that the order would be *ultra vires*. It is true that this proceeding is called a new case in one part of the report; but it was really an opening of the decree between the same parties, and what had been an absolute order for restoration was changed to a conditional one. If it was a new case at all, it must have been by way of review.

In 1839, Dr. Lushington varied a decree which had been made by his predecessor: *The Monarch*, 1 W. Rob. 21; and this case has, I suppose, fully established the practice in England: Coote's Adm. Practice, 63. It may be said that the decree was interlocutory; but it was one which disposed of the merits of the cause, leaving only damages to be assessed; so that it was a final decree, excepting for the purposes of an appeal, and no distinction was taken on that ground; but the power was denied in argument on the authority of *The Elizabeth*, 2 Acton, 58. That book I have not at hand; but, from the statement of the case in 2 Pritchard, Digest, tit. Practice, No. 1058, it seems that the court of appeals refused to vary its own decree, as being contrary to its practice. In *The Geheimrath*, reported in a note to *The Elizabeth*, the same court is said to have intimated that there might be a remedy in another shape, understood by Story, J., to mean a libel of review: *The New England*, 3 Sumner, 495. As to *The Elizabeth*, it may be observed that a court of appeal may well establish a different practice from that which would be proper for one of original jurisdiction, because in the court of appeal there is much less room for surprise and mistake; indeed, scarcely any danger, except from absolute fraud, which, I suppose, any court would relieve against. I may add, that our court of last resort is understood to be ready to revise its own judgments during the term, and in some exceptional cases afterwards: *Hudson v. Guestier*, 7 Cranch, 1; *The Palmyra*, 12 Wheat. 1; *Alviso v. United States*, 6 Wall. 457. But whatever may have been the practice in the court which decided *The Elizabeth*, it is not binding on the court of admiralty, as appears by *The Monarch*.

In the American cases, too, some doubts have been expressed by eminent judges; but the decisions have varied former decrees. See *The Glamorgan*, 2 Curtis, C. C. 236; *The Enterprise*, id. 317; *The Enterprise*, 3 Wall. Jr. 62; *The New England*, 3 Sumner, 495. We find a distinction taken in this country between a summary application to the court during the term at which the decree was made, and a libel of review after the term has passed. Terms of court were not known in equity and admiralty, and are still of little consequence in those courts; but, under the statutes of the United States, which appoint terms for all courts, the practice

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has grown up of considering decrees in equity as enrolled at the end of the term, by analogy to the practice at law. During the term, the decrees can be reviewed on motion or petition, and afterwards by bill of review, at any time within five years: *Cameron v. M'Roberts*, 3 Wheat. 591; *McMicken v. Perin*, 18 How. 507; *Brockett v. Brockett*, 2 id. 238; *Whiting v. Bank of United States*, 13 Peters, 6; Story, Eq. Pl. § 403.

Mr. Justice Curtis decided that courts of admiralty are within the rule which limits the power to grant a summary rehearing to the term at which the decree was rendered: *The Glamorgan*, 2 Curtis, C. C. 238. And no doubt he would, if the case had required any decision of the affirmative, have held that during the term they had such a power; for it is one that all courts in this country, civil and criminal, exercise, when justice requires it. In 1830, Judge Betts decided that he could not vary his decree, on motion, after the term: *The Martha*, Blatch. & How. 151. He doubted whether any practice had been established in the admiralty courts to vary decrees at any time, or under any circumstances, though he said they had a clear right to establish such a practice; and he further doubted whether all power was not gone when final process had been executed. In 1838, the same learned judge published his hand-book of practice, in which he repeated and enlarged on these opinions; and in the same year he made rules Nos. 156 and 157, for the practice of his court upon this subject, by which he required a summary motion for rehearing to be made at the term, and required libels for review to be filed before enrolment of the decree or the return of final process; meaning, perhaps, the enrolment when no final process was required, and the return of the process, when there was any. The decision of *The Martha*, refusing to vary a decree, on motion, for a mistake of law, after the term had passed, was in accordance with American practice. But if the reasons for the judgment were, as they appear to have been, that a court can enlarge its own powers by a rule of its own making, or that it should refuse to exercise an admitted power until it has seen fit to regulate its own practice, they cannot so well be defended.

In 1839, before the decisions in either *The Martha* or *The Monarch* had been published, Mr. Justice Story considered this

subject with his usual fulness of research and discussion, and said that he had not the slightest doubt of the competency of a court of admiralty to rehear a cause, pending the term, and before the decree was enrolled. He went on to show that, by the American practice, decrees were usually considered to be enrolled at the end of the term. Concerning a libel of review after the term, his opinion leans decidedly in favor of such a jurisdiction: *The New England, ubi supra*. Mr. Justice Grier, in the case in which he expresses a doubt about libels of review, considers it clear that the court may grant a rehearing before execution executed, according to a rule of the district court for the eastern district of Pennsylvania: *The Enterprise, ubi supra*.

In 1842, Judge Sprague took jurisdiction of a libel of review filed after the term, in an opinion in which he denies the soundness of the distinction taken by Judge Betts, as to process having been fully executed. His reasoning is made with evident reference to the opinion expressed in Judge Betts' book, then lately published, though he does not cite it: *Janvrin v. Smith*, 1 Sprague, 13. In 1846, he granted a rehearing in a case which had been fully tried; and on the rehearing he reversed his former decree, as it would seem from a note at the end of the report of the case: *Perkins v. Hill*, 1 Sprague, 123, 125. The records do not show that he entered a formal decree in conformity with his first opinion; but the prevailing party might have had it entered as of course. In 1849, the same learned judge varied a decree fifteen days after it had been made and had been fully executed, by requiring a libellant, on motion of a third person interested in certain proceeds in the registry, to repay into court the sum of one hundred dollars, out of a larger sum which had been decreed him out of those proceeds by a mistake on the libellant's part in making up his decree, and that a mistake not apparent on the record. Records, vol. xxxi. p. 189; vol. xxxiv. p. 135. In 1865, Mr. Justice Davis, of the supreme court, upheld the jurisdiction of the district court to entertain a libel of review after the term had passed: *Northwestern Iron Co. v. Hopkins*, 14 Am. Law Reg. 44.

It appears, then, that the power of an admiralty court of original jurisdiction to vary its own decrees has been freely exercised in England and in America, and has never been denied in any case

that called for a determination of the question, excepting that in America the summary process by motion has been held to be inapplicable after the term, which is the American equivalent of a decree enrolled, and, on the whole, a very convenient one ; and excepting that some courts appear to consider the power gone after the return of final process.

There is a further difficulty in this case, from the fact that this was a defaulted action, and rule 40 of the supreme court regulates such actions to a certain extent, by saying that the court of admiralty may, on motion of the defendant and the payment of costs, rescind the decree in any suit in which, on account of his contumacy and default, the matter of the libel shall have been decreed against him, and grant a rehearing thereof, at any time within ten days after the decree has been entered. It cannot be understood that this rule is intended to take away the jurisdiction of libels of review generally, because it makes no mention of any but defaulted actions. If, by mistake or fraud, a libel should be pronounced deserted, or if in any contested case, as were some of those I have above cited, justice could only be had by a libel of review, this rule does not touch them. And, upon consideration, I am of opinion, and so decide, that the supreme court, in passing this rule in 1845, while Judge Story was still on the bench, and must have had in mind the doctrines discussed and the opinions expressed in *The New England*, did not intend to regulate libels of review at all, but only to do what, indeed, the language of the rule fairly imports, provide for the rights of any defendant to have such an *ex parte* decree rescinded *on motion*, though the term should have lapsed within ten days. It is probable that the practice in defaulted actions was in need of regulation at that time. The old practice of the admiralty was very slow and cautious in that class of cases. It required a delay of a year and a day in all actions *in rem*, where no claimant appeared ; and this was recognized as the rule so late as 1839, by the supreme court of Alabama : *Read v. Owen*, 9 Porter, 180 ; and it is still the rule in prize causes, when condemnation is asked for on mere default : *The Julia*, 2 Sprague, 164. In personal actions, there were monitions, defaults, and decrees, in great numbers, before execution ; and, I suppose, by the early practice a decree

was not entered on the merits in personal actions until an appearance had been compelled by attachment.

Although, therefore, a mere motion cannot be entertained after ten days, I do not believe the rule was intended to deprive a defendant who has had no notice of the action, or, for any other reason, is entitled to review it, of his libel of review. A claimant, say, in an action *in rem*, whose ship has been seized, but who has had no actual notice, or was unable to attend; or in the case put by Judge Sprague, of a service by attachment of goods or effects without personal service; or in the case at bar, if it be true that the wrong person was served with process, there is no other remedy; for the appeal, like the motion for rehearing, is limited to ten days.

Janvrin v. Smith was a defaulted action; but as it was decided about three years before the rules of the supreme court were adopted, it is not an authority for their interpretation; though, in the opinion as published in 1861, there is a reference to the rules as if they existed in 1842, an oversight, no doubt, in revising the opinion for the press, but one which tends to show that Judge Sprague, who himself revised the opinions, saw nothing in the rules adverse to his decision. The case which is reported on appeal as *The Enterprise*, 2 Curtis, C. C. 317, consisted of two actions, in one of which a decree by default was opened by Judge Sprague; but, on examining the docket and records, I find that the account of the case given at p. 321 of 2 Curtis is incorrect, in this, that the application was not made after the adjournment of the court without day,⁶ but before, and, what is of more importance, it was made within ten days after the decree; so that it is not an authority upon the point now in judgment. However, for the reasons I have given, I think a libel of review may be maintained after ten days.

The last point is, that the officer's return of personal service on the defendant is conclusive. I might have thought so, but for the very important case of *Brewer v. Holmes*, 1 Met. 288, in which the supreme court of this State, giving their opinion by Shaw, C. J., held, that on a petition for review under the statute of Massachusetts, which, like a libel for review, is an equitable proceeding, the plaintiff in review, who was the defendant

in the original action, might prove, in contradiction of the officer's return, that he had received no notice of the action. By reference to that opinion, it will be found not to rest on any ambiguity in the return, or other circumstance peculiar to that case, as was ably argued before me, but upon the broad doctrine of equity and justice, in contradistinction to technical rules. It was argued in that case that the petitioner might have his remedy against the officer for a false return; to which the learned judge replies: "Supposing he could, which may be doubted, the result would be that the present respondent, the original plaintiff, would have a sum of money, which, in the case supposed, he had no just claim to recover, and the officer would be compelled to pay a like sum for a slight and perfectly innocent mistake. An officer goes to a house to leave a summons with John Smith. Not knowing the person, he is led to believe, without fault of anybody, that his brother, James Smith, is the man he is looking for; and he leaves the summons with him, and makes his return accordingly. This is a false return. If somebody must necessarily suffer loss, it is, no doubt, right that it should fall on him who made it. But, if it is seasonably discovered in time to prevent loss to anybody, why should not the remedy be applied, and the rights of all parties be secured?" I am content to follow the reasoning and practice of that case.

The application here is scarcely formal enough to be called a libel of review, though it is so indorsed. I think, however, as the whole matter has stood open by the tacit consent of the parties, and no rights have been changed, that I may treat this as an application for leave to file a libel of review. That is an application which should accompany the libel; and the practice should be, I suppose, to hear the preliminary question first, as is done in nearly all cases under the State statute. When I heard argument the other day, I understood that the parties were only prepared to present the legal aspects of the case, and so I did not go into the evidence concerning want of service. It would be hardly worth while to have two more hearings, and I will hear the parties on the whole case. The petitioner should at once prepare a formal libel, of which a precedent will be found in *Janvrin v. Smith*, Records, vol. xxv. p. 345, and I have no doubt

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the respondent will waive notice ; and then the case can be heard as soon as possible on all the questions together. If the decree should be varied, the present respondent will have the right to take all the questions, including the power of this court in the premises, to the court of appeal.

Libel of review to be filed within one week.

THE BELKNAP.

OCTOBER, 1873.

A ship, manned with landmen only, was to be moved to another part of the harbor, and, when coming out of her dock in tow of a steam-tug, collided with a lighter which was made fast to another ship in the same dock. *Held*, the tug was *prima facie* liable.

Some cases concerning the respective liabilities of tow and tug considered.

Whether the tug would be liable if the fault were shown to be with the master of the ship, *quære* ?

COLLISION. — TUG AND TOW. — The libellant was owner of a small ballast lighter, which was made fast alongside the ship Archer in the dock of a wharf in Boston, on the 23d February, 1873, when the steam-tug Belknap came into the dock to tow the ship Nonantum, which was lying on the opposite side from the Archer and a little higher up the dock, round to a dry dock for repairs. There was not room to pass if the tug should be lashed alongside the Nonantum, and she gave a line to the latter ; and the libellant's evidence tended to show that she began to tow, and was hailed not to come into the lighter, and that her master, or some one on board of her, answered that there was room enough. The Nonantum soon after struck the lighter, and damaged her to some slight extent.

The respondents denied that the tug was towing the Nonantum. Her master testified that he had not begun to haul taut. His opinion of the cause of the accident was, that the lines of the Nonantum were let go, and she fell over on the lighter, or that she drifted with the wind, which was blowing down the dock.

C. G. Thomas, for the libellant.

J. B. Richardson, for the claimants.

LOWELL, J. I wish to repeat that these cases should be brought on as speedily as possible, while the witnesses are at hand, and the matter is fresh in their minds. The court will always, as heretofore, make every effort to find time for speedy trials of admiralty causes. In this case we have lost the testimony of the master of the *Nonantum*, which would have been of most material assistance in settling the difficult question of fact involved in the issue. There is no doubt that either the ship *Nonantum* or the tug, or both, are responsible for this damage; for the lighter was lawfully in the dock, and was made fast there. If, indeed, it had been proved, as was alleged, that the libellant had failed to give place after due and ample notice, the case might be different. The only point argued was, whether the fault was with the ship or the tug. The master of the *Nonantum* was on board his ship; but there is no evidence that he was in command of her navigation, unless that is to be presumed. There was also a Mr. Murphy, and five or six men who had been engaged the day before to move or assist in moving the ship, which had no crew on board. Murphy and his assistants are landsmen, and call themselves ship-movers, or ship-haulers; but whether Murphy, or the master of the tug, or the master of the ship, had the command and charge of the whole business of moving the ship, is what the parties do not agree upon, and what is somewhat difficult to ascertain upon the evidence.

It was argued that the law has been laid down too broadly against tugs in this district, in *The R. B. Forbes*, 1 Sprague, 328, and *The Rescue*, 2 id. 16. In the latter case, it was held that an action *in rem* would lie against the steamer which furnished the motive power, although the tow had on board a pilot, who directed the motion of both ship and steamboat. This certainly seems an extreme application of the doctrine that the thing which does the damage is always responsible. It is the law in admiralty, generally speaking, that recovery may be had *in rem* against a vessel that is improperly navigated and thereby injures another vessel, without regard to the ownership, or possessory or any other title, of the wrong-doing vessel, or any inquiry as to what persons

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would be responsible in a personal action. A lien is fastened on the thing; and its owner and charterer, master and pilot, and all others interested, must settle their responsibilities between themselves.

When two ships, independently owned, but connected in a joint enterprise as tug and tow, have injured a third ship, the question of responsibility may be more difficult, and the authorities seem to be somewhat contradictory. I believe it is true, as argued, that no other case has gone so far as *The Rescue*; but whether that case was well decided or not I shall not need to consider.

In England, the rule is, that the ship is liable for all faults in her own equipment and management, or in those of the tug, on the simple principle of *respondeat superior*; because the ship hires the tug: *The Kingston by Sea*, 3 W. Rob. 152; *The Cleadon*, 14 Moore, P. C. 92. If the tug has committed any fault, her owners are to answer over to the ship-owners: *The Night-watch*, Lush. 542; but the latter assume full responsibility towards third persons, as they do for the conduct of their own officers and crew. Besides this, it is taken to be the fact in most of the English cases, that the navigation is under the charge of the ship's pilot. "To say," said Dr. Lushington, in a case of this character, "that the steamer had the whole charge of the *Ticonderoga*, is contrary to all common sense." *The Ticonderoga*, Swabey, 215, 217. If the ship have a licensed pilot, whose orders are obeyed by the tug, the fact, according to an exceptional law in England, exonerates both ship and tug: *The Duke of Sussex*, 1 W. Rob. 270. But if the pilot be not in command, or his commands are disobeyed, the ship is liable, for the reason already given: *The Borussia*, Swabey, 94; see *The Chieftain*, 1 W. Rob. 270; *The Gipsy King*, 2 id. 537. As the ship is responsible in every case in which the plaintiff can recover at all, and as there might be doubt about holding the tug under some circumstances, very few cases are brought against tugs.

The simple rule of the English law is not capable of application in this country. In the first place, the usual course of business here is for the tug-boat to take the actual charge of the navigation, and whatever faults are committed are usually by her offi-

cers or crew. Besides this, a very considerable part of the towing is done on the great rivers, such as the Hudson and the Mississippi, where the tow often consists of many vessels belonging to different owners. In some of the reported cases there have been thirty or more barges or canal-boats in tow of a single steamer, and, of course, it cannot be that they are all principals. This difference of trade has brought about a different mode of regarding the responsibility of the parties.

In an early case the supreme court of Massachusetts held that the owners of the tow did not stand in the relation of principals to the master and crew of the tug: *Sproul v. Hemmingway*, 14 Pick. 1. It is not easy to see how this conclusion can be avoided at common law, under the rule, now fully established, that the person who merely bargains for certain work to be done for him by a person who supplies the men and materials, and has the whole charge of the operation, is not responsible for the acts or neglects of the contractor or his servants. I do not need to decide whether this rule would hold good in the admiralty, or whether the English rule might not be sound in a case like those in which it has been adopted.

It has come to be the general practice in this country to consider the tug responsible, unless it can be proved that the actual fault was in the navigation of the tow. It is to be regretted, perhaps, that there should not be, if there is not, one simple rule holding one or the other in all cases. It appears to be the opinion of Judge Sprague that the law is so; and I do not now decide that question. The general course, however, having been to endeavor to prove which of the parties engaged in the joint enterprise is, *as between themselves*, in fault, the decisions in this country have not been entirely uniform, and the practice has grown up in some districts of suing both tug and tow, so as to risk nothing but costs, if only one of them should prove to be responsible. The cases cited below will show that in the third circuit they still adhere to the English doctrine, that the ship is the principal; while in the others and in the supreme court the tug is presumed to be the principal, and is to be held responsible for a fault on that side of the case, in the absence of evidence that the tow caused the damage: *The Creole*, 2 Wall. Jr. 485; *The Sampson*, 3 id. 14;

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Sproul v. Hemmingway, 14 Pick. 1; *The New York v. Rea*, 20 How. 543; *The Express*, 1 Blatch. 365; *The John Fraser*, 21 How. 184; *The Hector*, 4 Blatch. 199; s. c. *sub nom. Sturgis v. Boyer*, 24 How. 110; *The R. B. Forbes*, 1 Sprague, 328; s. c. 1 Cliff. 331; *The Clover*, 1 Lowell, 342. The law of this country is summed up by Clifford, J., in *The Mabey & Cooper*, 14 Wall. 204.

In only one of these cases was it decided that the ship would not be liable as well as the tug; and it may not yet, perhaps, be too late to establish a general rule, if it should be found the most just and reasonable. In the mean time, it must be admitted to be the law of the United States, founded on what I suppose to be a true assumption of fact, that when a vessel is in tow of a tug and runs into another vessel which is in no fault, *prima facie* the tug is responsible, whether the tow be so or not. I am prepared to admit, for the purposes of this case, that the tug would be exonerated, if it were shown that the master of the ship or her crew were alone in fault. I do not decide so, but take it for granted in this case. Now, what is the evidence here? The plaintiff's testimony puts it, by three witnesses, that the tug was seen apparently towing the ship towards the lighter, and was hailed, and some one replied that there was room enough. Here is, certainly, a *prima facie* case. On the other hand, the master of the tug denies the hail, and the reply, and the towing. He puts forward the very improbable theory that the vessel was to be allowed to drift down past the other ships in the dock; improbable, because no means were taken to warp her. This evidence leaves no one in command. It is not likely that the riggers and other landsmen were to do any thing more than tend the lines, and do work of that sort for a vessel moved from one part of the harbor to another. In the case above cited from 24 Howard, the circumstances were very similar, and there not only was the tug held, but the ship was acquitted. Upon the whole evidence, I do not think the claimants have overcome the plaintiff's case, and disproved the apparent responsible agency of the tug in this business.

Decree for the libellant.

Partridge v. Dearborn.

H. PARTRIDGE v. J. B. DEARBORN & AL.

DECEMBER, 1878.

It seems to be decided in *Wilson v. The City Bank*, 17 Wall. 473, that a fraudulent preference cannot be committed by the mere neglect of an insolvent debtor to go into bankruptcy.

Distinction between *Wilson v. The City Bank*, 17 Wall. 473, and *Buchanan v. Smith*, 16 Wall. 277, considered.

Where a creditor obtained judgment for a debt not yet payable, and thereby obtained a lien by levy on the goods of the debtor, — *Held*, the lien was invalid against the assignee in bankruptcy of the debtor, though the circumstances did not prove a statute preference.

BILL IN EQUITY by the assignee of Isaac Seabury against three judgment creditors, who levied their several executions on the goods of Seabury a few days before he filed his petition in bankruptcy, and caused them to be sold soon afterwards. The proceeds of sale were in the hands of the officer, who was made a party defendant. The bill charged that the judgments were obtained and realized by way of fraudulent preference. There was evidence that Seabury was a trader, and was insolvent, and known to the defendants to be so before they obtained their judgments. The bankrupt testified that he failed, through inadvertence, to enter his appearance in the suits, and had no intention that the defendants should obtain a preference.

C. S. Lincoln, for the plaintiff.

Boardman & Blodgett (*C. J. Noyes* with them), for the defendants.

LOWELL, J. No objection has been taken to the bill for multifariousness; and I understand that the convenience of all parties has been promoted by trying the several cases as one.

The late case of *Wilson v. The City Bank*, 17 Wall. 473, disposes of the most important part of the present controversy. It decides that no inference of an intent to prefer a creditor can be derived from the facts that the debtor is insolvent, and knows that the creditor is about to procure a judgment against him by virtue of which an actual preference can be obtained. The reason is that it is no part of the legal or moral duty of an insolvent person to file a petition in bankruptcy, nor to defend

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against a just debt sued for by one creditor in order to give time to other creditors to file such a petition. The next step in the reasoning is inevitable: that the state of mind in which a man omits to do what he is neither legally nor morally bound to do, is immaterial.

That case does, in a certain sense, overrule *Buchanan v. Smith*, 16 Wall. 277, by rejecting the arguments on which the decision in that case was rested; but the *decisions* can be reconciled in this way. In *Buchanan v. Smith*, the insolvent debtor was sued by Buchanan, and before judgment had been obtained, made an assignment to a third person for the benefit of creditors; this assignment was, of course, invalid as against the assignee in bankruptcy; but, when set aside in the court of bankruptcy, the property would go to the benefit of the general creditors, and not for the advantage of an intervening judgment creditor. It would be neither the duty nor the right of an assignee in bankruptcy to inquire into a fraud on a single creditor, unless the consequence would be to bring the assets, or some part of them, into the general fund. If I have not misread *Buchanan v. Smith*, it may stand upon these supports; but the theory on which it was decided, that a debtor can by mere neglect, from whatever motive, commit a fraudulent preference, seems to me to be wholly inconsistent with the reasoning and the conclusion in *Wilson v. The City Bank*; and, if the earlier case cannot be thus explained, it is overruled.

That a creditor may obtain an actual preference by pursuing his legal remedies, is one of the difficulties in the operation of all bankrupt laws, as was pointed out by Curtis, J., delivering the judgment of the supreme court in *Buckingham v. McLean*, 13 How. 169; and it was there suggested that the statute might guard against such inequalities, as has been done by some of the English acts. The latest revision of the statute in that country, 32 & 33 Vict. ch. 71, § 87, provides that, where the goods of a trader have been taken in execution and sold, the officer shall retain the proceeds for fourteen days; and if within that period notice of a petition in bankruptcy is served on him, he shall hold such proceeds, after deducting expenses, in trust for the assignee. Our courts, in endeavoring to work out an equitable

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rule from the existing law, adopted a construction which the supreme court have now pronounced to be unsound, as they did upon an analogous point under the act of 1841, in *Buckingham v. McLean*, *ubi supra*.

Although I am of opinion that the motive of the debtor in such a case is immaterial, yet as that precise question is left open in the late decision, I have carefully examined the evidence in this case, and am satisfied that Seabury, the bankrupt, is not proved to have wished that any preference should be obtained by the defendants.

There remains, however, in respect to the defendants, Scott & Co., a point both new and important. They obtained judgment for a debt, part of which had not matured when they brought their action. This fact was very properly urged as evidence of actual collusion on the bankrupt's part; and such collusion, if proved, would, beyond doubt, be "suffering" his property to be taken on legal process. But, upon all the evidence, I do not find the collusion. In my opinion, however, the assignee has a remedy for this wrong, though it is not a statute preference. The assignment conveys to the assignee all the debtor's property, subject to lawful incumbrances. The lien created in favor of Scott & Co., by the judgment and seizure, is an incumbrance, to be preserved, so far as it is lawful, and no farther; and a court of equity can inquire into its lawfulness.

An assignee, in so far as he represents creditors, is not absolutely bound by judgments against the debtor. In England, he is held not to be bound at all: *Ex parte Chatteris*, 26 Law Times, n. s. 174; *In re Fowler*, 1 Lowell, 163, and cases cited. In Fowler's case I refused to adopt the rule, that the bankrupt court could reopen all judgments; but expressed the opinion, to which I adhere, that creditors, and the assignee representing them, may collaterally impeach judgments against the bankrupt for fraud or error. This is always the right of third persons who have had no day in court. In the state court, no doubt, the assignee is a privy with the debtor; but he could not there avail himself of any fraud which merely tends to give the judgment creditor an advantage over others, for that is the very purpose of a judgment at law.

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If, then, Scott & Co. have committed a technical fraud on the other creditors in obtaining their judgment, it may be inquired into here. And it seems to me to be such a fraud on their part, that they sued for a debt as being payable which was not payable. In the State court they filed a bill of particulars, resembling in all respects their accounts rendered the bankrupt, excepting in the very important circumstance that it omitted the words "cash in three months" and "cash in four months," which appear on the face of two of their accounts respectively. This *suppressio veri* must be presumed to have been wilful, since without it they could not have procured the judgment and consequent lien which they now rely on. The adaptation of means to the end proves the design. Such a contrivance to obtain an advantage through the forms of law cannot be upheld by a court of equity, although it may not happen to be described in the statute as a fraudulent preference, or to have ever been undertaken before by any creditor; and though it may be a fraud that could hardly be committed if there were no bankrupt law. I do not set it aside as a fraudulent preference under the statute, but as a lien fraudulently obtained by the creditor without any assistance from the bankrupt.

Decree accordingly.

T. PRENTICE & AL. v. A. BETTELEY, *Assignee*.

DECEMBER, 1873.

The general rule, that in cases of contract for the sale of land, equity does not consider time to be material, holds to a certain extent and in a general sense.

But the exceptions are numerous, and include cases in which the contract or the remedy is not reciprocal, or in which there has been a considerable change in the value of the land.

A. agreed to convey real estate, if certain conditions were complied with before the end of six months; the other party was not bound to fulfil the conditions, and did not do so within the time; and, meanwhile, the property had risen considerably in value, — *Held*, that A. was not bound to convey, after the six months.

BILL IN EQUITY seeking a reconveyance of certain lands.
William H. Prentice and his two sons, George and Theodore,

carried on business as coal merchants on the land and premises known as Prentice's Wharf, in Boston, for many years ending with 1850, when Theodore, the plaintiff, retired from the firm. The father died in 1853, and afterwards George carried on business alone, under the old name of William H. Prentice & Sons, and Theodore was his chief clerk, and drew money from time to time, which was charged to him on the books, and he was credited with his salary at the rate of \$1,200 a year. Each of the brothers owned an undivided tenth part of Prentice's Wharf. In 1869, George and Theodore joined in a mortgage of their shares to the Delaware & Hudson Canal Company, to secure the payment of George's debt of \$20,000, of which \$15,000 and interest is still unpaid. In 1872, George W. Prentice failed, and certain informal meetings of his creditors were held, to see if a compromise could be effected. Among the assets exhibited to the creditors at one of the meetings, at which Theodore was present, was a statement from the books of George, showing Theodore to be very largely indebted to him.

No compromise with the creditors was made, and George Prentice filed a petition in bankruptcy. About the same time the mortgagees had advertised the land for sale, and it was feared that, if sold in that way, it would not produce much more than the mortgage debt, though a much larger sum could probably be realized from it by care and good management. The defendant, Albert Betteley, was agent for one of the creditors of George Prentice, and expected to be the assignee of his estate. He had several conversations with Theodore Prentice concerning the land, and the mode of saving it from the foreclosure; and Theodore expressed his willingness to give up all his interest in the land to aid the creditors in redeeming it, provided he could be released from all indebtedness to George's estate, though he did not admit the correctness of George's account. The defendant consulted with some other creditors, who agreed with him that the proposal was a good one for the estate. Theodore accordingly made a deed to Betteley, in fee, of all his interest in the wharf and lands adjoining, which were all the property he had. When the deed had been drawn it was suggested that some evidence ought to be preserved of the

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purposes for which it was given, especially as Betteley might not be chosen assignee; and Betteley accordingly gave back to Theodore a paper, in which, after reciting the deed and that George W. Prentice was bankrupt, and that he claimed that Theodore was indebted to him, it was declared that the conveyance was in trust for the creditors of George, and that if his assignee or trustee, thereafter to be chosen, should, within six months from the date of the declaration, make and deliver to Betteley, for the use of Theodore, a full and complete release from all claims, debts, and demands which Theodore owed to George, then it should be lawful for Betteley to convey the estate to said assignee or trustee, to hold as part of the bankrupt's assets. But if the assignee or trustee should refuse or neglect to execute and deliver the release, then Betteley should reconvey the estate to Theodore, subject only to the mortgages already existing thereon, and the effects of any foreclosure thereof. The deed and declaration of trust were both dated June 26, 1873.

Betteley was afterwards chosen assignee of the estate of George W. Prentice, but did not execute to Theodore any release from the debts due from him to the estate, until some time after the lapse of the six months, and Theodore then refused to receive it. Early in March, 1873, Betteley, as assignee, obtained leave of the district court to make the release, and he then tendered a formal deed to that effect. This was after he had received notice that Theodore considered the agreement at an end, and had sold his interest to the person for whose benefit this suit is brought. Betteley, shortly before applying for leave to release Theodore from his debt to George's estate, had conveyed the land to one Armstrong, who had reconveyed to him as assignee in bankruptcy of George's estate. The estate in the mean time had risen very largely in value.

The bill charged fraud on the part of Betteley in obtaining the deed, and a breach of the condition by not releasing the debts within six months. It denied that Theodore was indebted to George, and offered to pay whatever might be found to be due,

and prayed that upon payment of the debt, if any, a reconveyance should be ordered. The answer denied the fraud, and denied that time was of the essence of the contract, or of any importance to the parties. It further gave certain reasons, not connected with the plaintiffs or their conduct, for the failure to make the offer of release sooner, admitting, however, that it was not made within the time limited in the declaration of trust.

J. A. Loring & J. D. Bryant, for the plaintiffs.

H. C. Hutchins & A. S. Wheeler, for the defendant.

LOWELL, J. I leave out of view all question of fraud, because it is clear, and is not now denied, that no imputation whatever can be made on the good faith and honest dealing of the defendant. There is little difficulty in ascertaining most of the facts of the case. George W. Prentice was in bankruptcy; his assets, according to his own account, consisted largely of his interest in the wharf, and his claim against Theodore. One of the motives for giving the joint mortgage for the separate debt of George probably was that Theodore had been receiving advances from George. The mortgagees were threatening a foreclosure. The creditors had no one to represent them, and found it not easy to raise the money to redeem the estate. Theodore had no means for that purpose. Under these circumstances, it would not have appeared an unreasonable contract, if the parties had been in a position to make it, that Theodore should relinquish his equity, in consideration of a release of his indebtedness to George. This would give the creditors the whole equity to work with in raising money to redeem the mortgage, instead of only one-half of it, and would free Theodore from his debt. Such a contract as the parties contemplated would not have been unreasonable at the time. But, as I shall presently show, they made a unilateral contract, by which Theodore alone was bound.

In the mean time, the immediate exigency has passed, and the land has risen so much in value, that there is not only ample security for the mortgage debt, but more than enough beyond it to pay the largest amount that the creditors can possibly claim of Theodore. The prayer for a reconveyance is resisted, on the ground that equity does not regard time as essential in a con-

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tract for the conveyance of land. This is true to a certain extent and in a general sense ; but the exceptions are numerous, and include cases in which the contract or the remedy is not reciprocal, or in which a considerable change in the value of the land has taken place. Both these circumstances are found in this case.

First, as to mutuality. Here was no complete contract of sale, so much land for so much debt. The amount of the debt was in dispute, though it was not then denied by Theodore that he owed something considerable, perhaps \$8,000 or \$9,000, instead of the \$15,000 which George's books charged him with. He appears to have been willing to make such a sale, but the defendant was not ready to bind himself absolutely, and the whole transaction amounted to an offer on the part of Theodore to convey his land at any time within six months, in discharge of the debt, if the creditors of George, acting by the assignee, chose to discharge him. This offer he might have retracted at any time before the other party had accepted it, if he had not bound himself at law by giving a deed of the land ; and even after that he might, perhaps, retract in equity. But this is unimportant, because the offer was neither accepted nor retracted within the six months. I am not aware that a court of equity has ever extended the time for the acceptance of an offer.

Granting that the plaintiff was bound for six months, as he held himself to be, the other party was bound to nothing excepting to return the land if the release were not furnished. It was argued that when Betteley himself became the assignee, and the six months had elapsed, the plaintiff was *ipso facto* discharged of his debt. If Betteley had been acting in his own right, there would be force in this argument ; but I am not ready to decide that an assignee in bankruptcy can bind the assets entrusted to him, by any mere neglect of this sort. If, therefore, the situation had been changed in the reverse direction, that is, if the land had fallen in value, and Theodore had become possessed of other property, so that a debt against him would be valuable, there is no authority under the bankrupt act for holding that the

assignee would have lost his remedy against Theodore, by his merely retaining the land beyond the six months.

This unilateral arrangement was made by Theodore Prentice for the convenience of the creditors, to enable them to avail themselves of his offer immediately, or at any time within the period agreed on. The time given was enough, and more than enough, for a decision ; and the creditors did not bring themselves within the exact terms of the offer. As values stand now, the offer was one which would not be made by a prudent man. I see no reason why a court of equity should refuse to carry out the exact agreement of the parties, especially as the plaintiff offers to pay all the pecuniary consideration there ever was for his offer. He asks that his conveyance may be treated as a mortgage to secure his debt to the estate, which is all that equity can ask under the circumstances.

It is by no means accurate to say that equity takes no note of time. The general rule in equity, as at law, is, that parties may make their own bargains, and must keep them. Equity is very unwilling that an estate should be forfeited by mere neglect to keep an appointment for the payment of money at the day agreed on. The early application of this doctrine to mortgages, by which an equity of redemption was created, was eminently just, and was acquiesced in ; though of late years all persons have agreed on a form of mortgage which very much modifies this equity, by giving the mortgagee a power of sale on short notice. Its application to a failure to pay rent at the day was just, and was adopted by the common-law courts in Massachusetts, when there was no court of chancery in this State. Equity carries its objections to a forfeiture so far, that, in an ordinary contract to buy and sell land, it is unwilling that a good bargain shall be lost by unpunctuality ; but, in this class of cases, the exceptions embrace more cases than the rule. Indeed, the doctrine itself is exceptional, and is explained by Mr. Justice Story, quoting and approving Baron Alderson, as being only this, that equity has power to carry out what seems to be the true intent of the parties ; and if there are no circumstances to show that either party would suffer any hardship, or that any equitable consideration existed against it, the court will presume that the sale was the main thing,

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and the precise time of completing it was not essential: Story, Eq. § 776, n. 1. "But, then, in such cases," the learned author proceeds to say, "it should be clear that the remedies are mutual; that there has been no change of circumstances affecting the character or justice of the contract; that compensation for the delay can be fully and beneficially given," &c.: § 776.

That time was not considered very material by the parties when they made this arrangement, I think highly probable. If either party had preferred to fix five months or seven months, rather than six, no doubt the other would have agreed to it. In that sense, time was not essential. But the change of values is so very considerable, that it has become inequitable for a court to make a new contract for the parties, and no court will do so after such a change: *Brashier v. Gratz*, 6 Wheat. 528; *Barnard v. Lee*, 97 Mass. 96, per Gray, J., explaining *Goldsmith v. Guild*, 10 Allen, 239; Story, Eq. § 776; Adams, Eq. 88.

Decree for an account and reconveyance, on the plaintiffs' paying what may be found due by Theodore Prentice to the bankrupt's estate.

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DECEMBER, 1873.

Persons who assist a vessel in distress at the request of her master or owner, with no definite arrangement for compensation, must ordinarily be paid as salvors.

If the rate of payment is established by the usage of a port well known to both parties, the payment for salvage services may be affected or controlled by such usage. The distinction sometimes drawn between absolute and contingent contracts for salvage services is misleading, and of no practical importance.

A contract, whether absolute or contingent, for services in saving property on the sea or in a harbor, does not oust the jurisdiction of this court of a proceeding, *in rem* or *in personam*, brought by the contractor himself.

SALVAGE. — Libel of Moses B. Tower and the Boston Tow-Boat Company, for services rendered in raising the schooner Louisa Jane, a pilot-boat of Boston, which had been sunk in the harbor near Fort Independence, Dec. 17, 1873, by a collision.

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The libellants asked for meet and suitable salvage. No appearance having been entered for the schooner, the court proceeded, after the return-day, to assess damages *ex parte*, as usual. The evidence thus taken disclosed that the libellant Tower considered himself entitled by contract to a certain amount, though it should equal or exceed the value of the schooner. Thereupon an amendment of the libel was ordered by the court, with notice to the master and supposed owner of the pilot-boat. Mrs. Louisa Jane Fowler, wife of the master, appeared and claimed the schooner, and made a deposit for costs; and, by consent, the case was heard without the formality of an answer. Much oral evidence was taken concerning the services performed and their value, and the usage of the port of Boston in such cases.

F. Goodwin, for the libellants.

A. Wellington, for the claimant.

LOWELL, J. It was supposed by the libellants, when they brought this action, that in all cases of services in the nature of salvage the suit should be brought for salvage, and the contract, if there were one, should be given in evidence to regulate the damages. This is the practice in England, and there is no special objection to it when the action is defended; but in this case the libellants' claim might possibly exceed a salvage reward, and so the frame of the libel might have misled the owner of the vessel. It was for this reason that the amendment was ordered, if the libellant intended to insist on his contract.

It has been often decided in this circuit that persons who go to the assistance of a vessel in distress, at the request of her master or owners, but with no definite arrangement for compensation, must ordinarily be presumed to go as salvors, and not as contractors or laborers to be paid a *quantum meruit*: *The Versailles*, 1 Curtis, C. C. 353; *The Independence*, 2 id. 350; *The Island City*, 1 Cliff. 210; *The Susan*, 1 Sprague, 499. The case of *The Independence* was very fully considered by the learned judge; and his decision was affirmed at Washington, though by a divided court. Its doctrine is doubted by Mr. Parsons, 2 Shipp. & Adm. 308, and note 4 (ed. 1869); but has been followed by Mr. Justice Clifford and Judge Sprague, in the cases above cited, not only as having been settled, but as rightly settled. The point,

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after all, is one of fact; and the facts proved here are wholly different from those which appeared in the cases cited. It seems that in this port there has grown up within ten or fifteen years past, and perhaps in consequence of those decisions, a regular wrecking business, conducted, in large part, by the libellant, Tower, relative to vessels that are beached or sunk within reach of assistance from Boston; that the libellant's charges are tolerably well fixed, on a liberal scale, certainly, but still upon a sort of *quantum meruit*, and that they are not higher than may be accounted for by their peculiar nature, and by the necessity of constant readiness on the libellant's part to perform them, on instant notice, at all times and seasons; and that they are paid without much reference to value saved or risks run, or any thing but the time and means actually employed.

It is admitted that the usage may govern this case; but whether the usage is to pay when the service is unsuccessful, is not clear, and is not admitted. This uncertainty concerning the contract makes it proper for me to examine the law of salvage as regulated by contract; and the examination must be somewhat careful and elaborate, because there are several *dicta* of eminent judges which have been understood to deny the jurisdiction of this court, at least *in rem*, over a contract for saving property at sea, when the pay was to be absolute, without regard to success.

The earliest of the remarks to which I refer was made by Mr. Justice Curtis, in *The Versailles*, *ubi supra*, and they are reiterated and expanded in *The Independence*, 2 Curtis, C. C. pp. 356, 357, where it is said by the court: "When, therefore, the subject-matter of a contract is a mere attempt to save property, and when the owner or his representative, or both, become personally liable by the contract to pay either an agreed sum or a *quantum meruit* for the labor and service rendered, without regard to the results, the parties do not contemplate, nor engage in, a salvage service, but quite a different service." . . . "Such a contract is inconsistent in its nature and objects, and the liabilities which grow out of it, with a salvage service. As Lord Stowell declared in *The Mulgrave*, 2 Hagg. 77, it is a case of contract,

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and not one of salvage. I do not intend to be understood, however, that a case in which a contract exists may not also be a case of salvage. The parties may agree on the amount of a salvage compensation, or on the principles upon which it shall be adjusted; and such agreements, fairly made, no advantage being taken of ignorance or distress, are readily upheld by the courts; [citing certain cases]. Nor do I intend to express any opinion on the question whether the admiralty has jurisdiction *in rem* to enforce a contract for assisting a vessel in distress, which are not salvage services."

A similar division of possible contracts is made by the learned judge in *The Susan*, 1 Sprague, 508, in which he calls a contingent agreement by the name of "salvage," and refuses that name to one in which the pay is to be absolute. He, however, makes no question about jurisdiction; and neither of these cases decided any such point: they decided, as I have said, that a salvage service, in the strictest sense, is to be inferred, when no definite bargain of any sort is made. Then, there are three cases in which salvage suits have been dismissed, and in which the courts have, to a greater or less extent, appeared to rely on the fact that the payment was not to be contingent on success: *The Whitaker*, 1 Sprague, 282; *One Hundred Tons of Iron*, 2 Bened. 21; *The Marquette*, 1 Brown, 364. I shall show hereafter that these cases do not decide the point now under consideration, because they were all suits by sub-contractors, or laborers under contractors, and not by the contractors themselves.

The differences between contract and salvage are very marked, and pervade the whole subject; but they are nearly as important where the contract is contingent, as where it is absolute; and they are not, in this country, jurisdictional differences. Mr. Justice Curtis, as we have noted, cites *The Mulgrave*, 2 Hagg. 77; but he is not accurate in citing it as an absolute contract for payment at all events. The report clearly shows, I think, that the contract was contingent, though nothing turned on that point, and it was not mentioned in the argument or the judgment. Lord Stowell, in contrasting contract and salvage, in his decision of that case, was adverting to the point, only too well established at that time in England, that the admiralty was not permitted

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to hold pleas of contract. Even seamen, whose general right to sue in that court was never denied, could not recover there any thing which was due by usage, or by any contract which was at all out of the usual course of shipping articles. It is my impression that the judges of the queen's bench imagined that Dr. Scott and Dr. Robinson, who certainly held a lieutenant's commission, had been promoted from the forecandle of a man-of-war, and could not understand a usage or stipulation that was not familiar to every foremast hand. At all events, they were prohibited from enforcing them; and, whenever ship owners became bankrupt, a painful failure of justice was likely to occur, by reason of the inability of a whalesman, or any other sailor whose contract was peculiar, to enforce his just rights against the ship itself: *The Sidney Cove*, 2 Dods. 11; *The Mona*, 1 W. Rob. 137; *The Riby Grove*, 2 id. 52; *The Debreccia*, 3 id. 83. The last of these unfortunate cases was *The Harriet*, 1 Lush. 285, decided in March, 1861. In May of that year, parliament came to the relief of the admiralty court, made it a superior court of record, and in many other respects strengthened and enlarged its powers, and in sect. 10 of the statute gave it jurisdiction of "wages due under a special contract:" 24 & 25 Vict. ch. 10. It had already, in August, 1840, given the court power to deal with all claims and demands whatsoever in the nature of salvage or towage, or for necessities supplied to a foreign vessel: 3 & 4 Vict. ch. 65, § 6. In commenting upon the act of 1861, soon after its passage, a learned author said: "The jurisdiction of this court did not [before the statute] extend to rights and questions arising upon contract. It determined the reward of merit and the compensation for injuries; but stipulated rights, though held in view in advancing to a result, never formed the basis of its proceedings:" MacLachlan on Merchant Shipping (1862), Suppl. 56. See the remarks of Dr. Lushington in *The Ocean*, 4 Notes of Cases, 33.

We see, then, that until the reign of the present sovereign of Great Britain the distinction between service and contract, whether the service were in the nature of salvage, or wages, or any thing else, was often a most important jurisdictional distinc-

tion ; and, in contrasting salvage and contract, Lord Stowell was referring to something which went to the very power of the court. And so he has usually been understood, and the case has been often cited in that sense. Dr. Lushington, however, who was of counsel in the case of *The Mulgrave*, has explained it away to a considerable extent. He says it only decided that when the defendant in an action for salvage sets up a valid contract, and pays the money into court, the decree goes for him, as in any other case of a good tender: *The Catherine*, 6 Notes of Cases, Suppl. 43. Since this decision there have been a great many cases of the same sort ; and it is the practice in England for the libellants (or whatever they are called) to demand salvage in all cases, and, if they rely on a contract, to give it in evidence, very much as at common law a plaintiff would introduce a promissory note under a count in *indebitatus assumpsit*. If, on the other hand, the owner of the property desires to set up the contract, he does so, together with a tender: *The True Blue*, 2 W. Rob. 176 ; *The Jonge Andries*, Swabey, 226, affirmed, id. 303 ; *The Henry*, 15 Jurist, 183 ; *The Crus. V.*, Lush. 583 ; *The William Lushington*, 7 Notes of Cases, 361.

The English practice is certainly very ingenious. It appears to be understood that a valid contract bars an action for salvage, even since the act of 1840 ; but the courts will not admit it as a bar, unless the money due under it is paid into court for the use of the plaintiff. It has not been directly decided since 1840 whether the court could entertain a suit founded distinctly on a special contract for saving property wrecked or in distress at sea. The act, using the expression, "demands in the nature of salvage and towage," would seem to be sufficient ; but so late as 1861 it was decided that there was no jurisdiction of a special contract for towage: *The Martha*, Lush. 314. However, the practice avoids all such questions.

In this country, though the distinction between contract and salvage must always be of great consequence in awarding the damages, it is not, and never has been so, in a jurisdictional point of view. Thanks to the great jurists, who were called upon to interpret the grant of admiralty jurisdiction contained in the constitution, we have retained a great part of the powers which

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anciently and of right belong to this court. We hold pleas of all maritime contracts, absolute or contingent, without being obliged to resort to fictions or indirections of any sort.

It cannot be doubted that a contract to raise a vessel, sunk in navigable waters, is a maritime contract. And the mode in which payment is to be made cannot, in this country, have the least bearing on that question. A payment in gold is quite as much within our cognizance as one in pearls gathered from under the sea, though that difference would probably have been vital in the eyes of the old common law of Lord Coke's time. A payment absolute cannot convert a maritime contract into one not maritime, though a contract of either kind may give a concurrent jurisdiction to the courts of common law. Many maritime contracts, such as those for freight, seamen's services, &c., are, or formerly were, contingent upon the completion of the adventure ; but many others are not, or are sometimes contingent and sometimes not, according to circumstances.

A contract for saving wrecked property being maritime, the property saved is hypothecated for its fulfilment. This is so of all maritime contracts, whether contingent or absolute. The apparent exception of supplies to a domestic ship is an accident, the relic of common-law usurpations, and confined to the jurisprudence of England and the United States, in the latter of which the several States have taken great pains to correct it. Indeed, I consider the lien for towage to be quite decisive of this case. This contract was, in great part, an agreement for towage, and in the rest for the use of lighters in similar work ; and I am not aware of a case in which it has been held, or even argued, that such a contract does not create a maritime lien.

The only case in which the point has been directly adjudged is *The A. D. Patchin*, 1 Blatch. 414, in which the contract was absolute, and an argument was addressed to the court founded on that circumstance. Judge Conkling's able opinion in support of the jurisdiction *in rem* in that case was in all respects sustained by Nelson, J., and has never been directly questioned or met, excepting by a query of Curtis, J., which is by no means an expression of opinion, as I shall show.

Mr. Justice Story, in his well known remarks in *The Emulous*, 1 Sumner, 210, takes no such distinction, but speaks alike of all contracts. "I take it to be very clear," says the learned judge, "that whenever the service has been rendered in saving property upon the sea, or wrecked on the coast of the sea, the service is, in the sense of the maritime law, a salvage service. If it has been rendered under circumstances which establish that the parties have voluntarily, and without any controlling necessity on the side of the proprietors of the property saved, or their agents, entered into a contract for a fixed compensation, or upon the ordinary terms of a compensation for labor and services *quantum meruerunt*; in either case it does not alter the nature of the service as a salvage service, but only fixes the rule by which the court is to be governed in awarding the compensation. It is still a salvage service and a salvage compensation."

I will now consider the cases, which at first sight seem to be adverse to the jurisdiction. They are three.

1. *The Whitaker*, 1 Sprague, 229, 282. There Holbrook had agreed to launch a stranded vessel for \$900, and, after trying and failing to accomplish any good result, he employed Otis, who worked with his men, and succeeded; but thinking they had earned more than the agreed sum, they libelled the vessel (which was owned in Maine) as material-men. The court dismissed the libel, on the ground that if they were material-men, which he evidently did not consider them to be, they had no lien, because they worked under one who had no power to bind the vessel beyond \$900 in any event, and he intimated that some one might recover that sum in an action for salvage. In the second suit, which was for salvage, a decree was entered for Otis and Holbrook for \$900; but the men who had worked by the day under Otis were not admitted to be salvors, and this for the reason that their contract clearly showed that they looked to Otis personally for their pay in all events, whether the vessel were saved or not. In that case, at p. 282, is a head-note, which appears to lay down the general proposition that an agreement to labor for an agreed compensation, to be paid at all events, displaces a claim for salvage. But it is evident that all that the case decides is, that day-laborers, under a contractor who has undertaken to

The *Louisa Jane*.

save a vessel for a fixed sum, cannot be joined with the contractor in suing the vessel for that sum. The decision, therefore, in the second case of *The Whitaker* was substantially the same as in the first; namely, that Otis had no power to impress the vessel with liens, whether they were called by one name or another. It is, in this respect, precisely like *The True Blue*, 2 W. Rob. 176, where two smacksmen had undertaken to relieve a vessel for a certain sum, and afterwards engaged other smacks to assist them; and it was held that these assistants must look for their compensation to their immediate employers, and not to the vessel saved. If it were otherwise, the original contractor might involve the property to an amount exceeding the whole contract price. So in the case at bar, if Tower had undertaken the job for a fixed price, or for a fixed proportion of the value saved, the tow-boat company, knowing the facts, could not be permitted to assert a lien which might override the agreement. As the contract here was for a *quantum meruit*, I do not know that there is a valid objection to the tow-boat company being a party plaintiff jointly with Tower, to the extent of what is reasonably due for its part of the services. This depends on whether Tower had any express or implied authority to employ such services on account of the owner. In *The Whitaker* and *The True Blue*, the contract being for a fixed sum, there could be no implied authority to subject the vessel or her owners to any other or different payment.

2. *The Marquette*, 1 Brown, 364, decided by Judge Longyear. That case was like *The Whitaker*, and a sub-contractor, who had bargained with the contractor for pay at all events, was not allowed to libel the vessel alone. The learned judge cites *The Whitaker* and *The Independence*, and explains the former case very clearly. He does say, as one reason why the libel cannot be maintained, that the pay was not to depend on success, and this form of contract, he says, creates only a personal obligation, and not a lien. This is true in the case of a sub-contractor, and is probably all that is intended.

3. The last case is *One Hundred Tons of Iron*, 2 Bened. 21, where the libellant had let out certain tools to a wrecker, and

Judge Blatchford held that he had no action in the admiralty, personal or real. This appears to be like the other two cases.

That this is the true significance of these decisions, is shown by several cases in England, in which the direct question was litigated whether a contractor could proceed in the admiralty for his reasonable compensation, as well as for the money expended in saving a wreck; in all of which the decision was favorable to the jurisdiction. The discussion was most elaborate in *The Happy Return*, 2 Hagg. 198, though that was not the first case of the kind. There a merchant was employed under a power of attorney from the owner of the vessel, with the consent of the underwriters, to save whatever could be rescued from a sunken ship. His payment does not appear to have been contingent upon success. Sir C. Robinson decreed in his favor for his expenses, and a reasonable compensation for his services, though he said it was not a case of salvage, strictly so called. A similar course was followed in *The Traveller*, 3 Hagg. 372; *The Watt*, 2 W. Rob. 70; *The Purissima Conception*, 3 id. 181; *The Favorite*, 2 id. 255; and there are others. In *The Favorite*, Dr. Lushington is reported to have said, "Although I cannot view his services in the strict character of salvage services, but rather of a successful and meritorious agency," &c., decreeing for the plaintiff.

It will be observed that in none of these cases were the laborers, or sub-contractors, or furnishers of materials, made parties to the action; and, if they had been, I have no doubt their asserted liens would have been rejected, for the reason that they had contracted with a person, and under circumstances which repelled the inference that any lien was or could be stipulated for; as in *The Whitaker* and *The Marquette*.

When Mr. Justice Curtis, in giving judgment in *The Independence*, speaks of a contract to bar salvage, he must have had reference only to its preventing the court from assessing a salvage compensation on the usual liberal rule of the maritime law. Indeed, he twice expresses himself so, at pp. 355 and 359, though there are other passages which have been understood to bear a wider meaning. But that I am right in my construction of his language is clear from this, that, when he comes to speak

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of the jurisdiction *in rem*, he carefully avoids expressing an opinion, and refers to *The A. D. Patchin*. I understand in the same way the expressions used by the court in *The John Shaw*, 1 Cliff. 230; *The Island City*, id. 210; *The Camanche*, 8 Wall. 448.

I conclude, therefore, that whether the libellant Tower was to be paid at all events or not, which is doubtful, yet in either case he can recover against the vessel the sum due him under his contract.

The judge then examined the evidence of services, and made up the account by items, awarding in all \$966.60.

Re GEORGE H. LANE, BRETT, & CO. — Ex parte DREYFUS.

JANUARY, 1874.

One who holds the bare legal title to a note given by a debtor cannot set off against it, in bankruptcy, a debt which he owes the bankrupt for goods bought.

Where A., holding such a note, proved it against the debtor's estate, after deducting the price of the goods, — *Held*, he had proved too little; and that his proof should be expunged without prejudice to his proving the note in full, as trustee for the equitable owner, or to a proof by such owner.

SET-OFF IN BANKRUPTCY. — Charles and Jacob Dreyfus, composing the mercantile firm of Dreyfus & Co., proved a debt of \$1,047.14, against the estate of the bankrupts, at the first meeting of the creditors. Afterwards the assignee of the estate applied to the register, in the mode pointed out by General Order, No. 34, to have the claim re-examined and disallowed. The issues and evidence were certified to the court. The claim sought to be expunged was for the contents of the promissory note of the bankrupts for \$1,519.58, and interest, less the amount of an account of about \$500 for goods bought of them by Dreyfus & Co. The assignees alleged that the note really belonged to Weil & Co., its original holders, and had been transferred to Dreyfus & Co. after the failure of the bankrupts, though before their petition was filed, in order to enable Dreyfus & Co. to get the full benefit of the set-off, subject to an ultimate settlement be-

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tween the parties after the amount of the dividends in the bankruptcy should be ascertained. The conclusions of fact are stated in the opinion of the court.

M. Storey, for the proving creditors. We hold the legal title to the note, and could maintain an action upon it: *Way v. Richardson*, 3 Gray, 412, and therefore may prove it in bankruptcy. That we bought the note after the known insolvency of the makers is immaterial: *Re City Bank, &c.*, 6 N. B. R. 71.

R. M. Morse, Jr., for the assignees, cited *Smith v. Hill*, 8 Gray, 572.

LOWELL, J. The evidence in this case is of a character to satisfy me that the bare legal title to the note was transferred to Dreyfus & Co. If the indorsement were made under any definite and complete arrangement by which the purchasers were to own the note absolutely for a consideration paid down, or even for a credit to Weil & Co., if the latter were their debtors, for precisely what they received in dividends, then the set-off might be made, provided the purchase of the note was not at so late a period as to bring it within some prohibition of the statute. On this last question, that is to say, whether a purchase made after the known insolvency but before the technical bankruptcy of the debtor can be the subject of set-off, the authorities are divided; but I shall not consider it, for all that I can ascertain of the facts is that there was a legal transfer; and I feel bound to say the note was held by Dreyfus & Co., simply as trustees for Weil & Co.

Under such circumstances a set-off is not allowed, either by the general statutes of Massachusetts applying to solvent persons, or by the bankrupt law. The whole law of this matter is admirably stated in *Forster v. Wilson*, 12 M. & W. 191, in which the earlier cases are discussed. And it has been repeatedly held in this country that when a trustee is party to an action or to a proof in bankruptcy in his representative character, the only debts which can be set off on either side are those of the persons for whom he is representative, and not his own personal debts.

So here, if Weil & Co. are equitable owners of this note, Dreyfus & Co., holding the legal title, cannot use in set-off, to diminish their claim as such trustee against the bankrupts, a debt they

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themselves owe him for goods bought. To do this, they must have acquired the true as well as the nominal property in the note.

The true objection, then, to the proof of this debt by Dreyfus & Co., is that they have proved too little; that, instead of proving the whole note as trustees for Weil & Co., they have only proved part of it, assuming to diminish it by an inadmissible set-off. As, however, the assignees appear to fear some embarrassment in collecting the \$500 due them from Dreyfus & Co., if the proof stands in its present form, the order will be:—

Proof expunged, without prejudice to a new proof by Weil & Co. or by Dreyfus & Co. as trustees, for the full amount of the note.

COLEMAN CROWELL & AL. v. GEORGE KNIGHT.

JANUARY, 1874.

The sharesmen in a cod-fishing voyage are not to suffer loss by the bad debts contracted by the owner in the sale of the fish. The account is to be made up as cash.

Where the sharesmen gave an order upon the owners to pay their shares to A., and A. ordered payment to be made to B., which was done, and B. afterwards failed, — *Held*, the payment discharged the owners, though the order was not negotiable.

LIBEL for wages on a cod-fishing voyage from Marblehead to the Grand Banks, and elsewhere, during the season of 1872. The libellants were two of the four “sharesmen,” the defendant was the owner of the vessel. The contract was that the sharesmen were to have five-eighths of the fish which should be caught, after deducting the general supplies and other supplies according to the custom and usage of the port of Marblehead; and the owner to have the right to sell all the fish and oil whenever he should think proper. Seven of the seamen shipped for specific wages in money. The usage was admitted to be, to deduct from the gross proceeds of the voyage the great general charges; then from the balance to take the three-eighths belonging to the vessel; and from that balance the small general charges, including

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the wages of such seamen as were shipped for wages; and to divide the remainder among the sharesmen. The account rendered by the defendant, and not disputed, made the gross sum originally due each of the sharesmen \$380.77, from which deductions were claimed for advances, which were admitted. A further sum of \$105.93 was claimed for losses by the failure of a merchant who had bought part of the fish on thirty days' credit, he being then in good standing in the trade. The other question was whether the balance admitted by the defendant to be due had been duly paid. The plaintiffs, having gone on another voyage, sent orders in writing to the defendant to pay their shares to Captain David Morrissey, who was then on his way to Marblehead. The accounts not being ready, Morrissey gave a written order to pay the money to L. A. Surette, which was done, excepting the amount claimed to be deducted for the bad debt. Surette afterwards failed, and was now in bankruptcy.

C. G. Thomas, for the libellants.

H. W. Paine, for the respondents.

LOWELL, J. It has been repeatedly decided in the whaling business that the owners are to pay the lays or shares of the seamen according to the cash value of the oil and bone at the time of its arrival, and that the seamen have no concern with sales for credit, and are not chargeable with any losses that may be sustained by such sales. Some of these decisions have been reported: see *Hazard v. Howland*, 2 Sprague, 68; *Bourne v. Smith*, 1 Lowell, 547. The reasons are, that the shares are wages; that the seamen have no ownership in the oil or other catchings, and no right to interfere in its sales; and that they ought not to be expected to assume, and have not assumed by their contract, the delays or risks of the mercantile part of the adventure.

The sharesmen in a fishing voyage do in some respects make a contract more resembling a joint mercantile adventure than those which are usual in whaling voyages; but in the essential matters which govern this case the difference does not seem to be material. They are seamen whose shares are substantially wages, and they are seamen who are to be cured of illness contracted in the course of their duty at the ship's expense: *Knight v. Parsons*, 1 Sprague, 279. They have a lien on the vessel, and

in some circumstances on the fish ; but it is not the lien of partners. They have no voice in the disposal of the catch in any respect ; but are creditors of the owners, not bound to go into a court of equity for an adjustment of accounts.

A custom or usage of the port of Marblehead is pleaded, that sharesmen are to receive only their proportion of what may be realized from the sales of the fish and oil. The evidence to support the usage cannot be said to reach the precise point of this case, because the only losses by bad debts that any witness can recall occurred in this very year, 1872, and arose out of the failure of the same house to whom these fish were sold. Indeed, the impression left on my mind by the whole evidence was that the sales of fish had almost always been for cash, or else that there had been no failures in the business, so that no usage could have arisen on the subject. No one could recollect that any seamen had lost any thing by bad debts for a very great number of years ; and if the course of business would have suggested any thing in particular to the mind of a person shipping on such voyage, it would be that the pay, at all events, was sure.

The other point is whether the payment to Surette discharges the defendant. There was nothing in the circumstances of the transaction, or in the usual course of business in such cases, that tended to prove either an express or an implied license by the plaintiffs to Morrissey to employ a sub-agent or substitute. It is therefore probable that Morrissey himself is bound to make good the loss by Surette's failure. But this consideration does not seem to me to be decisive of the question as between the parties here. An order to pay the money to Morrissey appears to import that the defendants may pay it to him in any way he may direct. For instance, if he wrote to them to deposit the money in a certain bank, or to send it to him by mail, it does not seem to me that they would be justified in inquiring whether Morrissey had a right, as between himself and his principals, to use those methods of collecting the money. If Morrissey had forwarded his receipt for the money, and ordered the defendants to make payment to Surette, it would be in accordance with the usual mode of doing business, that they should pay upon his order. And this is substantially what occurred. Any other rule would

make the propriety of the payment depend on the form of the receipt, which is hardly in accordance with good sense. Indeed, by ordering them to pay Surette, Morrissey undertook to give the defendants a proper receipt whenever they should demand it. I cannot think that in such a matter as this any rule about the due execution of powers ought to govern the decision, but that I must hold the payment to be a good discharge *pro tanto*. The facts stated in the answer were admitted to be true, but there is a clerical mistake apparent in dividing the shares; one quarter of \$1,547.08 is \$386.77, and not \$380.77.

From the figures given in the answer, I find myself unable to state the account to my own satisfaction. It should be made up without charging to the libellants their share (\$105.93 each) of the bad debts, but charging them with the actual payments to Surette. And they should have interest on the amounts due them for twenty months, *i.e.*, from date of libel, say 10 per cent in all. I thought I had worked this out to give each about \$100; but I cannot be sure that I understand the figures of the answer.

Interlocutory decree for the libellants.

LOUISIANA INSURANCE COMPANY v. NICKERSON.

MARCH, 1874.

The statute of 2d March, 1867, 14 Stats. 453, makes arrests for debt, whether on mesne process or execution, depend upon the laws for similar arrests in the States respectively, and applies to admiralty proceedings.

This court will not order a defendant to give a stipulation to the action, under pain of imprisonment, in a case in which he is not liable to arrest.

By a rule of this court, passed in 1855, a warrant to attach the goods and chattels, or, in default thereof, the credits, of the defendant, may be granted in cases in which an arrest cannot legally be made.

It is within the power of the court to make such a rule.

LOWELL, J. The admiralty rules of 1845, adopted and established a simple system, like that then in use in some of the districts, by which the plaintiff in a personal action in the admiralty could always obtain security for his debt or damages when the defendant was able to give it; because he could arrest

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the person of the defendant, or, if he could not be found, his goods and chattels, or failing these his credits, to the amount sued for, and the person or property thus attached was held to answer the suit, unless the defendant should give bail to the action; that is to say, not only to abide the orders of the court, but to pay the debt: Rules 2, 3, and 4. This practice has many features of resemblance to that obtaining in actions at common law in the United States, excepting that it retains from the ancient times of prohibitory legislation the inability to attach land or any interest therein by process out of the admiralty. It differs too from that with which we are familiar in New England, in not permitting an attachment in all cases, whether the defendant can be found or not. Out of this restricted right of attachment grows the present application to obtain a stipulation by order of the court, which could not be required under any of the forms of process expressly mentioned in the admiralty rules, because the defendant was found in the district and was personally served with the monition, and was not liable to arrest under the statute of March 2d, 1867, 14 Stats. 453, which, as both parties admit, has adopted the limitations of the State practice in the matter of arrest for debt, in the admiralty courts as well as in others.

The argument in support of the motion, if I understand it, is that the ordinary process in admiralty, in personal actions, whatever may be its form, is intended to enforce the appearance of the defendant; and that, when he has appeared, he is to stipulate for debt and costs before being permitted to answer. The ancient authorities cited by counsel seem to bear out the argument, considered purely as an historical one; and there are remarks of Mr. Justice Johnson, in the leading case of *Manro v. Almeida*, 10 Wheat. 473, to a like effect. But the decision in that case virtually was that the effects attached might be held to satisfy the decree in the case of an absent defendant: *Clarke v. N. J. Nav. Co.*, 1 Story, C. C. 531. It has long since ceased to be the practice of the courts of the United States, to consider an attachment of property as intended merely to secure an appearance, or that a defendant is bound to give security, unless to release his person or property from arrest. The simple and reasonable American practice was that the plaintiff might secure

himself by arresting the body of the defendant, or in some cases by attaching his property, and those he would hold to respond to the judgment or decree, and it was a privilege of the defendant to relieve his person or his estate by giving security, if he were able and willing to do so ; or, finally, the defendant might be merely summoned to appear and answer. This, as we have seen, was the system sanctioned by the rules of 1845 : but it did not originate with them. The practice of the first and second circuits — which at that time, before admiralty jurisdiction had spread to the lakes, had a great part of the business of the whole country — was substantially similar to this. And in fact the courts of common law and admiralty did not differ greatly in this matter, though in equity attachment of the person was and is still used to enforce an answer when discovery of facts within the personal knowledge of the defendant is needed. No doubt there may be similar process in the admiralty for a like purpose. When the defendant was once before the court, whether by summons, citation, or however otherwise, he was not required to plead, unless he chose, but might suffer default, and the matter of the suit or plaint or libel or bill would be decreed against him.

This general course of practice has had its simplicity much marred by the statutes abolishing and limiting arrest of the person. Judge Ware, in one of his most learned opinions, decided, in 1835, that, in actions for damage, the usual condition of the bond or stipulation of a defendant who was found within the district was and should be to appear and abide the decree ; a condition which would be satisfied by his surrender, and that he was not bound to stipulate to the action : *Lane v. Townsend*, 1 Ware (2d ed.), 311. The rules of 1845, as we have seen, authorized the marshal to take bail for the debt, and not merely to appear and abide. It is the opinion of a learned writer that this rule is permissive only, and that the marshal would be justified in taking bail for the defendant's appearance ; though, when the defendant had appeared, he supposes the court would require him to give bail to the action, unless he could prove his inability to find sureties, in which case he would be excused from all but the bond to abide : Conkling, *Adm. Prac.* (2d ed.) 90, 91. In 1850, the supreme court passed rule 48, which

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provides among other things that, when a warrant of arrest is executed, the marshal and the court shall take bail only in those cases in which it is required by the laws of the State where an arrest is made upon similar or analogous process from the State courts. Following that, Judge Sprague, in November, 1855, promulgated a rule for this district, authorizing the marshal to strike out from the bond mentioned in admiralty rule 3, the words: "to pay the money awarded by the court to which the suit is returnable, or in any appellate court," and insert in their stead: "and not depart without license." Then came the law of 1867, putting the arrest for debt, whether on mesne process or execution, in all courts of the United States on the footing of similar arrests in the State courts of the respective districts, which has always been treated as applying to admiralty proceedings, and was so treated by the plaintiff when he took out and executed his citation without arrest.

The plaintiff now asks me to order security under pain of imprisonment. Such an order would amount to a revival of imprisonment for debt in a more oppressive form than that which was abolished; for it would be the substitution of a mere order on motion for the old warrant of arrest, which had its regular order and incidents, and well-settled course of procedure. In all essentials its effect and purpose would be exactly similar.

R. H. Dana, Jr., for the libellants.

F. W. Hurd & O. W. Holmes, Jr., for the respondents.

Motion denied.

After this motion was denied, it was discovered that Judge Sprague, in 1855, had made a rule that, whenever the defendant in a personal action cannot be lawfully arrested, the process may be a warrant to attach his goods and chattels to the amount sued for, or, if such property cannot be found, his credits and effects in the hands of the garnishees named therein. The libellants thereupon moved for such a warrant, and the motion was spoken to by the same counsel, on the question whether the rule was *ultra vires*.

LOWELL, J. The power of this court to make a rule concerning process is denied. The supreme court have undoubted power

to regulate the whole matter by the statute of 23d August, 1842, § 6, 5 Stats. 518; but this court has an equally undoubted power under the act of 8th May, 1792, § 2, 1 Stats. 276, unless the rule is either inconsistent with some action of the supreme court, or that court have avowedly covered the whole ground in any particular instance. The forty-sixth admiralty rule recognizes this power, but does not create it.

So in bankruptcy the supreme court have full power over the matter of practice and forms and modes of proceeding; and there is no reservation in the statute of any power to the district or circuit courts, and I have seen a *dictum* of one district judge that those courts could make no rules in bankruptcy. But every circuit and district court, excepting perhaps that of the learned judge in question, has made such rules, and it is perfectly well understood that the power is derived either from the inherent authority of the courts, or from the act of 1792, above cited; or at all events that it exists. The only question therefore is whether the supreme court, by giving authority to begin all personal actions by a warrant to arrest, or an alternative to attach goods, &c., if the defendant cannot be found, intended to say that in cases where arrest was illegal, and so the defendant could not be found for any useful purpose of arrest, there should be no attachment. I think not. If this be the law, there is now no mode of obtaining security in a personal action, unless the debtor is not found. This may be in accordance with the law of some of the States, but it has never been so in New England. Such a construction would leave the case of a corporation defendant unprovided for in any event; for such a person can never be arrested. Before the rule was passed, Judge Sprague had authorized a warrant of attachment to issue against a domestic insurance company: *Pettingill v. Gloucester Mutual Fishing Ins. Co.*, Records, vol. xxxviii., p. 800. Such an attachment appears to have been issued in *Atkins v. Fibre Disintegrating Co.*, 7 Blatch. 555; and no objection was taken on the point now under consideration,¹ though the warrant did not come within the letter of the

¹ The supreme court has since upheld the attachment in that case: 18 Wall. 272.

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rule of the supreme court, and indeed, as I have said, is open to the same criticism as is made now upon Judge Sprague's rule.

Supposing, however, which I do not, that the rule of the supreme court covered the whole ground in 1845, congress has since passed a law which necessarily destroys the uniformity of practice, because it adopts the different laws of the various States on the subject of arrest ; and thereby *ex necessitate* repeals so much of the rule of the supreme court as authorizes such arrest in all cases, and this seems to me to throw upon the district courts the right to adapt their processes anew to the changed practice, until the supreme court shall take some further order in the premises.

Second motion granted.

JOSHUA RICHMOND & AL. v. THE NEW BEDFORD COPPER
COMPANY.

MARCH, 1874.

Courts of admiralty, within the limits of their jurisdiction, resemble courts of equity in their practice and modes of proceeding, but are even more free from technical rules.

If a court of equity would not dismiss a case because some of the joint plaintiffs refused to proceed, a court of admiralty would not dismiss a libel under similar circumstances.

It seems that at law one of two joint contractors has the right to sue in the name of both, subject to the right of the other to be indemnified for costs, and to give a release of the joint cause of action.

A similar rule applied in the admiralty, where ten out of thirteen owners, having a majority of the shares in a ship, brought a suit in the name of all the owners.

Motion by the three unwilling plaintiffs to have their names struck out of the libel denied, with leave to apply to have the suit stayed until they were indemnified for costs.

It seems that part owners of a ship cannot release a debt due to all the owners, if the debtor knows that the debt is due to all the owners as such.

PARTIES IN ADMIRALTY. — REFUSAL TO JOIN. — Libel for damages brought by thirteen persons, owners of the bark *Lan- cer*, of New Bedford, alleging that the defendants had contracted to furnish that ship with a suit of bronze metal for her repair, and had undertaken that it should be fit, suitable, &c., and had furnished an article which was put upon the ship, but which

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proved not to be bronze metal, and to be unfit, &c. Three of the plaintiffs filed a statement that the libel was brought without their consent, and that they did not and do not participate therein, and asking that their names may be stricken therefrom. The defendants thereupon filed an exception to the suit for want of parties.

LOWELL, J. It is a rule founded in justice that a single cause of action, though it accrue jointly to several persons, ought to be the subject of but one suit, and, in whatever mode the object may be attained, the courts must manage that the controversy shall be settled once for all. If part owners of ships have made a contract with a third person, which is joint in its nature, no doubt this rule applies to them, and their action on the contract must be joint: Story, Partn. § 454. The defendants argue that, at common law, any joint contractor may prevent action on the joint contract by refusing to give his consent, and that in this respect a court of admiralty will follow the practice at law. They admit that in equity a way might be found out of the difficulty.

No authority has been produced for the assertion that the practice in admiralty is like that at common law in this particular, excepting some very general remarks made by Conkling and Betts, J.J., that the rules of admiralty resemble substantially those of other courts. This is true; but when courts of law and equity differ, the practice of the admiralty resembles much more nearly that of the latter. This is explained in part by the fact that both have borrowed more freely and for a longer time from the civil law; but, however explained, it is certain that their systems of pleading differ essentially from those of the common law. This is even more true of the admiralty courts than of those of the chancery. The former have not full chancery powers, and they deal with a limited class of subjects; but all their processes and modes, both of practice and decision, are equitable. Many remarks of eminent jurists sustain this statement. Thus, Mr. Justice Story: "No proceedings can be more unlike than those in the common law and in admiralty:" *The Adeline*, 9 Cranch, 284. "They are not governed by the strict rules of the common law, but act upon enlarged principles of equity:"

The Virgin, 8 Pet. 550, and he made many other similar observations in other cases. So Lord Stowell: "This court certainly does not claim the character of a court of general equity; but it is bound by its commission and constitution to determine the cases committed to its cognizance on equitable principles and according to the rules of natural justice:" *The Juliana*, 2 Dodson, 521. "Within the limits of that very extended equity, which this court is in the habit of exercising:" *The Fortitudo*, 2 Dodson, 70. Mr. Benedict says that the American admiralty is freer from technical trammels than either the common or civil law: Adm. Prac. § 358. It would be easy to multiply quotations of a similar purport, but a brief review of certain well-known classes of decisions will be of more value than any general remarks, even of the most eminent jurists. Courts of admiralty have never had a statute of jeofails, and have never needed one. So far have they carried the power to allow amendments, that it has been laid down by the highest authority that an action can never fail for want of proper allegations, if merits clearly appear in the record. And several cases have been sent back from the supreme court, with orders to permit amendments and then to proceed to a decree. I am not speaking of amendments to introduce new facts, but those of either form or substance to conform to evidence. See *The Adeline*, 9 Cranch, 244; *The Caroline*, 7 Cranch, 496; *The Anne*, id. 570; *The Edward*, 1 Wheat. 261; *Newell v. Norton*, 3 Wall. 257. These great powers are derived from the very constitution of the court, and the immemorial course of its proceedings. So it has more than all the powers of a court of equity, in permitting a joinder of actions, as where all the seamen, or all the salvors, of a vessel, though their rights may be totally distinct and several, are permitted, and even required, to join in one action. When the law did not permit parties to be witnesses, courts of equity would authorize plaintiffs to withdraw from a suit in order to testify, in some cases. Courts of admiralty permitted the testimony without requiring the withdrawal. So in these courts, either party can interrogate the other, and not merely the plaintiff the defendant as in equity. It has always treated seamen as equity treats wards, &c., and has set aside in their favor contracts, whether

sealed or not, which were found to be oppressive. Within its sphere it has full and equitable powers to marshal legal and equitable liens on a ship or on any fund lawfully in its custody. These examples show the freedom from technical rules, and the analogy to the proceedings in equity, which were adverted to by the authors I have cited. I understand it to be admitted that the plaintiffs, who ask to have their names stricken from the pleadings, own but an insignificant fraction of the ship concerning which the contract was made; and, if so, they ought by all analogy to be subject to the vote of the majority in bringing a joint action. There is no ground of reason, or of general law, apart from a supposed technical rule of pleading, which would authorize the minority to put a veto on this or any other honest proceeding on the part of the other owners, and when this is admitted and that a court of equity would not stop its course for such a motion, the case seems to be ended. I am not, however, prepared to admit that a court of common law, at the present day, would permit the three protesting plaintiffs to go out of court. The cause of action must be settled in one suit, and there is nothing the plaintiffs can lose but costs; and if some of the owners desire one court and some another, and some none, justice seems to demand that the greater part in value should prevail, and that the recusants should be indemnified for costs. The common law of England appears to be settled according to the view just mentioned, and before I had examined the late cases in that country, I ventured to suppose such to be the law of Massachusetts. I have not found any case in this State directly in point one way or the other, and I remain of the same opinion. The latest English writer on the subject, says, "one of the coplaintiffs has a right to bring an action in the name of both, nor has the court any right to interfere unless the coplaintiff's name has been used, not only against his will, but fraudulently:" Dicey on Parties, p. 108. The following cases, most of which are cited by Mr. Dicey, sustain his summary of the law: *Whitehead v. Hughes*, 2 Dowl. Prac. Cases, 258; *Emery v. Mucklow*, 10 Bing. 23; *Laws v. Bott*, 16 Mees. & W. 300; *Ex parte Turquand*, 1 Mont., D. & DeGex, 475; 1 Lindley, Partn. 226. The principle of these decisions is as well fitted to

a case of ten against three as of one against one, especially as the ten have a preponderance and not a mere equality of interest. The learned author goes on to say that the partner or other coplaintiff is not without remedy, because he may either, first, require indemnity, and have the suit stayed until it is furnished, or, second, release the action. The latter course is a bar at law, unless the release is fraudulent, and only leaves the releaser liable to his copartners for damages. It can hardly be even at law that one owner in a ship, known to the defendant to be so, can release a cause of action accruing to all the owners. That would closely resemble the undertaking by a tenant in common of land to give a valid acquittance to the terre tenant, after notice to the latter to pay the other share to the true owner, which was not permitted at law: *Harrison v. Barnby*, 5 T. R. 246. If one co-owner has received his own part, say of the freight or other money due to the owners, it is left doubtful by Mr. Justice Story whether the remaining owners can sue at law, or must resort to equity: Story, Partn. § 454, note 2. My impression is, that in Massachusetts it might be considered that a severance had been effected by the consent of the defendants, and if so the remedy would remain good at law. "If," says Parsons, C. J., "a factor should in fact account with and pay one partner his share, and thereby discharge all his interest in the partnership, this would be an implied engagement to account with each partner severally:" *Austin v. Walsh*, 2 Mass. 405. In this case there is no plea or suggestion that the three recusant plaintiffs have undertaken to release either their own interest, or that of all the owners, and the libel stands simply as one they do not care to prosecute. I do not think the other owners can be put in a worse position by their objection, than if there had been an actual payment and release of part or all the supposed debt or damage.

Upon the whole, as I do not consider that the motion to strike out would be granted in its present form, either at law or in equity, and as courts of admiralty are more free from technical trammels than even courts of equity, and as it is not contended that the merits of the case are at all involved in this application,

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I do not consider it necessary or proper to send the parties to a court of equity.

My order therefore is: The exceptions of the defendants are overruled. The motion of the plaintiffs, W. J. Rotch, Gideon Allen, and Gilbert Allen, is denied, with leave to them to revive it hereafter, if so advised, in a modified form, namely, that the suit be stayed until they are indemnified for costs.

G. Marston & C. W. Clifford, for the plaintiffs.

T. M. Stetson, in support of the exceptions.

Re SOUTHER. — Ex parte TALCOTT.

MARCH, 1874.

If the indorser of a note pays a part of the money due upon it to the holder, after the bankruptcy of the maker, for a full release of his (the indorser's) own liability, the holder may prove the note in full against the estate of the maker, because he is, in law, trustee for the indorser to make such proof, and must hold for the benefit of the indorser any dividends he may receive above the balance remaining due him on the debt.

Such a payment is not a discharge of the promisor, *pro tanto*.

PROOF OF DEBT. — PAYMENT BY SURETY. — This was a question upon evidence certified by the register, concerning the debt offered for proof by Frederic Talcott, and called for a decision whether the amount paid by an indorser of a note, after the bankruptcy of the maker, and after an affidavit in due form had been made by Talcott for proving the debt, but before the first meeting of the creditors, and therefore before the debt could be admitted to proof, should be deducted from the debt as a payment *pro tanto*. The case was not argued.

LOWELL, J. The general rule undoubtedly is, that the holder of a note may prove against all the parties for the full amount, and receive dividends from all until he has obtained the whole of his debt with interest. It is likewise the general rule, that what he has received from one party, or from dividends in bankruptcy of one party, to the note, are payments which he must give credit for if he afterwards proves against others: *Sohier v. Loring*, 6 Cush. 587; *Ex parte Wildman*, 1 Atk. 109; *Ex parte The Royal Bank of Scotland*, 2 Rose, 197; *Ex parte Taylor*,

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1 DeGex & J. 302. I am of opinion that this latter rule must be confined to cases in which the payment has been made by the person primarily liable on the note or bill. The two cases last above cited cover the whole ground of this inquiry. In the former, it was held that such credit must be given for dividends received after a claim had been made in bankruptcy, but before the debt was actually and formally proved; and in the latter, that when such payments had been made by the drawer of a bill of exchange, and the proof was offered against the acceptor, still the credits must be given. One of the learned justices, however, in giving judgment, reserved his opinion whether the rule would apply if the holder offered his proof as a trustee for the drawer, or for the estate of the drawer. The theory of this decision is, that no creditor can prove for more than his actual debt, as it exists at the time of proof, without obtaining an undue advantage over other creditors. The answer attempted to be maintained by the creditor in that case, was, that a holder may sue for the whole debt at law against the party primarily liable, and hold the money for whom it may concern. For this position he cited *Jones v. Broadhurst*, 9 C. B. 178, then recently decided. The court of appeal in bankruptcy expressed doubts whether *Jones v. Broadhurst* stated the true rule at law, and decided that the rule in bankruptcy, at all events, was well settled against it, unless, perhaps, the holder proved that he was acting as trustee for some one whose liability was subsequent to that of the bankrupt.

It seems to me, however, that the argument in favor of the proof in full was sound. The better opinion at common law is, that payment by a drawer or indorser does not exonerate the acceptor or maker, unless the promise of the latter was for the accommodation of the former, or there is some other equity which makes the note or bill the debt of the party who has made the payment, or unless he has made it at the request or for the benefit of the acceptor or maker: *Byles on Bills* (10th ed.), 221, and cases there cited. If this be not the rule at law, still I consider it to be so in bankruptcy. The statute, sect. 19, adopting the equities of the case, declares that if a surety, or other person liable for a bankrupt (and this undoubtedly includes indorsers), pays or satisfies the debt, or if he remains liable for

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the whole, or any part of it, he may prove it in bankruptcy, or require the creditor to prove it, in order that he may have the benefit of the dividends. This law does not expressly meet the present case, because the indorsers here have neither satisfied the debt, nor do they remain liable to pay it, but they have taken an intermediate course, by paying a part for a full release of their own liability. Under these circumstances, in the absence of any stipulation one way or another about the maker of the note, who was already a bankrupt, the law will imply that the holder is to prove the whole debt; and, if the dividends are more than enough to pay him in full, after crediting to the surety what he has received from him, the creditor will hold the surplus for the benefit of the surety. This, though not within the exact language of sect. 19, is fully within its spirit. It is not, however, as a construction of that section that I find the law, but merely that the section recognizes a familiar equity, and takes for granted that a creditor may prove the debt notwithstanding payment in whole or in part by a surety, because he in fact proves as the trustee of the surety. The payment made by the indorser after the maker of the note was a bankrupt, cannot be proved by the surety as money paid, unless it comes precisely within sect. 19, because it had not been paid at the time of the bankruptcy. It must either be provable as part of the note in the hands of the holder, and for the benefit of the indorser, or not provable at all, and in the latter case it would not be barred by the discharge. This was one of the motives for the enactment that the surety may compel the creditor to prove, and it takes for granted, as I have said, that the creditor might prove voluntarily. The case of *Jones v. Broadhurst*, and those which follow it on the one side, or differ from it on the other, deal merely with the fact, or the presumption, whether or not the payment is intended to discharge the debt of the principal debtor; if not, the right of action remains good. The fact in this case is, that the surety gave a certain sum for what is equivalent to a covenant not to sue him, and it is not for the bankrupt to say that his debt is thereby paid, when he has not furnished the means to pay it.¹

Proof admitted in full.

¹ *Re Ellerhorst*, 5 N. B. R. 144; *Downing v. Traders' Bank*, 2 Dillon, 186.

528 Pieces of Mahogany.

528 PIECES OF MAHOGANY.

MARCH, 1874.

Where the possession of movable property has been changed, against the right of the true owner, by a maritime tort, or by the breach of a maritime contract, to which the property was subject, the owner may vindicate his title in a court of admiralty by a proceeding *in rem*.

A party who would be the defendant in ordinary cases may often assume the character of libellant in a court of admiralty, in order to bring his case before the court, if the opposite party is in possession of the *res*, or of a fund in which the libellant has a right to share.

ADMIRALTY. — JURISDICTION. — The libel alleged that certain mahogany, of which the five hundred and twenty-eight pieces were a part, was shipped at St. Domingo, in August, 1874, on the American brig *Surprise*, F. L. Norton, master, to be carried to Genoa, and there delivered, in accordance with the terms of two certain bills of lading, to the libellant, who was the owner thereof; that the master put into Yarmouth, Nova Scotia, and there, without right, sold the cargo, and became himself the purchaser; that said Norton had shipped several parts of said cargo to different ports for sale, and among others to Boston, and was about to ship the same hence to London; that the libellant believes said Norton is about to convert the cargo to his own use; that the libellant is willing to pay the freight and other charges, if any, due said Norton, but denies that any thing is due under the circumstances. The prayer was for a restoration of said cargo, upon payment of whatever may be due thereon.

The question of jurisdiction was submitted to the court, without formal pleadings, and was argued by *H. C. Hutchins & H. H. Currier*, for the libellant, and *C. S. Lincoln*, for the claimant of the cargo, who was said to be not the master himself, but a purchaser from him.

LOWELL, J. The libellant's case has been excepted to in the outset in a somewhat informal way, by consent of parties, in order to test the jurisdiction of the court. Few decisions have been found by counsel or by me in which a restitution has been ordered by the admiralty of goods found separated from a vessel in circumstances like those set forth in this libel. Undoubtedly,

such titles are usually tried in the State courts, excepting when they concern ships, which, in this country have been held to be within the cognizance of the admiralty, and which have lately been put on the same footing in England. At the hearing I was much disposed to doubt whether the admiralty replevin, so to call it, extended fully to cargoes, or what had lately been cargoes, as well as to ships; but, upon further reflection, I am of opinion that the suit may be maintained.

The admiralty has authority to seize and restore to the true owner all goods, or their proceeds, wrongly taken at sea, whether by simple robbery, or under color of a capture as prize of war, whenever and wherever and in whosoever possession such goods or their proceeds may be found within the territorial jurisdiction of the admiralty court whose power is invoked in the premises: *The Amiable Nancy*, 8 Wheat. 546; *Rex v. Broom*, 12 Mod. 185; *The Hercules*, 2 Dodson, 353; 1 Kent, Com. 379. So, in salvage, the owner of goods upon which there is a lien for salvage may reclaim them in the admiralty, submitting to the court the question of salvage, and offering to pay the amount. In *Post v. Jones*, 19 How. 150, the master of a whale-ship wrecked in the Arctic Ocean had sold her catchings to the claimants; and the owners of a part of the cargo proceeded *in rem* against the oil and whalebone, praying to have possession delivered to them of the oil, &c., or its proceeds, if sold, subject to salvage and freight. The supreme court sustained the libel, and ordered the circuit court to divide the proceeds according to the mode pointed out in the opinion.

In the two classes of cases that I have mentioned, the courts of admiralty have a peculiar, and in many respects exclusive, authority. A court of common law cannot deal directly with questions of prize, and probably not with salvage, as I have had occasion to show in another case.¹ But, upon the whole, I do not see that this consideration will serve to distinguish all those cases from the present. Over some of them the other courts would have had a concurrent jurisdiction; as, for example, the title to a ship or cargo, not involving a point of prize or salvage,

¹ *Studley v. Baker*, *ante*, 205.

but of simple spoliation; and possibly of salvage, if a sufficient tender had been made.

The case of *Post v. Jones*, *ubi supra*, bears a strong analogy to this. There, as here, the owners of cargo alleged that the master had sold it in his own wrong, and they reclaimed it; and though some salvage was admitted to be due, yet it hardly seems that, if the case had involved only freight, the jurisdiction would have been lost, since the court has the same jurisdiction of affreightment that it has of salvage, though it is not so nearly exclusive.

A manuscript report of a case before Judge Benedict has been handed me, in which the owner of a cargo which had been put on board a ship for conveyance to South America, and afterwards unladen again in port in consequence of damage by fire, brought a libel, and alleged facts to prove that the libellant was not bound to permit the ship to carry forward the cargo under the circumstances. The learned judge so found, and ordered the cargo to be restored. No question was raised about the jurisdiction.

Judge Betts has expressed the opinion that a person deprived of his property on the high seas, whether with the connivance of the master or agent having charge of it, or not, and without regard to any marine tort having been committed, was entitled to a remedy in the admiralty, because the transaction is of a maritime character: *Am. Ins. Co. v. Johnson*, Blatch. & How. 26. If this opinion is sound, it must follow that the jurisdiction would not be ousted by the fact that the cargo had been converted on shore rather than at sea, because, in matters of contract or of title, the place where an act was done is immaterial to the jurisdiction.

It is one of the equitable features of admiralty practice, that the party who would usually be the defendant may often bring the matter before the courts, as in *Post v. Jones*, where the persons, who would have been respondents in an ordinary salvage suit, were permitted to assume the character of libellants. In short, I am unable to see that *Post v. Jones*, and other like cases, can rest on any less broad foundation than this, that where the possession of movable property has been changed, against the right of the true owner, either by a maritime tort or by the breach

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of a maritime contract, to which the property was subject, the owner may vindicate his title in a court of admiralty, not only *in personam*, which is not doubted, but also *in rem*.

The reasons for the adoption of the practice may have been that such cases almost always involve maritime questions, and that the remedy in admiralty is more convenient and more adequate, its powers and proceedings being largely equitable. If the owner of the oil in *Post v. Jones* had been obliged to recover his property, by a proceeding at common law, one party or the other would have run great risk of losing what the supreme court found to be his equitable right. If the sale had been pronounced void, the owner might, perhaps, have recovered judgment on the strength of his legal title, without payment of freight or salvage; or, if the court found that freight or salvage were due and had not been tendered, or insufficiently tendered, they might have been obliged to find against the general owner, notwithstanding his title, on the ground of an undischarged lien in the defendant.

Finding this case to be of a maritime character, and considering the analogies presented by the cases cited, I am of opinion that the jurisdiction is successfully maintained *in rem*.

Jurisdiction sustained. Case to stand for answer.

Re J. S. ROBINSON.

APRIL, 1874.

A fourth general meeting of a bankrupt's creditors having been called after the lapse of about five years from the date of the third, and of the bankrupt's discharge, for the purpose of declaring a dividend from assets unexpectedly realized, — *Held*, that a creditor, having a just debt, might prove it at that meeting, and receive dividends, as provided by sect. 28, not disturbing the former dividends.

BANKRUPTCY. — TIME TO PROVE DEBT. — Three meetings were duly held in this case, a dividend was paid, and the bankrupt received his discharge. About five years afterwards funds came to the hands of the assignee from assets which had been considered worthless, and a fourth meeting was called, at which a second dividend was declared. A creditor holding a debt admitted to be just, and to be provable, unless he was too late in

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applying, offered to prove at this meeting. The register, at the request of the assignee, certified to the court the questions: 1. Whether the creditor could prove at this meeting. 2. If so, whether the dividend, or sum of money in the nature of a dividend, which he should receive, should be the same as if he had proved before the first dividend had been declared. No argument was made.

LOWELL, J. I know of no provision of the statute which requires a creditor to prove his debt at any particular time. The proceedings are for the benefit of all the real and honest creditors; and, if one of them delays to prove, he merely takes the chance that an incompetent assignee may be chosen, or that other things which he might have prevented will be done, or that the estate may be fully divided before he proves; but when he does come in, he takes his share of the remaining assets with the others. This was expressly declared by sect. 13 of the original insolvent law of Massachusetts: *Minot v. Thacher*, 7 Met. 348. In revising and changing the law from time to time, this explicit declaration was dropped, and sect. 102 of Gen. Stats. ch. 118, simply says: "No creditor whose debt is proved at the time of the second or any subsequent dividend shall disturb any prior dividend;" but this undoubtedly implies that a creditor may prove at any such time, provided he do not interfere with former dividends. The bankrupt act, § 28, Rev. Stats. § 5097, would seem to have been taken from this section of our General Statutes. After providing for a third meeting, at which a second dividend shall be declared, which is to be final, if possible, it goes on to provide for further dividends in case funds afterwards come to the hands of the assignee. This follows closely sects. 98 to 101 of the insolvent law, Gen. Stats. ch. 118. Then follows in the same order the provision that no dividend already declared shall be disturbed by reason of debts being subsequently proved, which is not a literal copy of sect. 102, but seems to have the same meaning, that debts may be proved at any time, but they shall not compete with earlier proofs by disturbing dividends already declared. This has always been the practice here, under both the State and the national systems, and I know of no law, decision, or practice opposed to it. On the contrary, the law of bankruptcy has always

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been that debts may be proved at any time. The longest time that I know of was fifty-six years after the beginning of the proceedings; but there are several cases of proof after more than thirty years: *Ex parte Johnson*, 3 DeG. M. & G. 218; *Ex parte Peake*, L. R. 2 Ch. 243. The only provision of the statute which has any tendency in the opposite direction is sect. 27, Rev. Sta. § 5092, which requires the retention of sufficient funds when the first dividend is declared to meet any debts, which for any sufficient reason have not been proved. This protects the assignee in disregarding debts which have been delayed for no good reason, but does not mean that all debts offered after that time shall be rejected, unless good reason is shown for the delay. The creditor takes the risk, as I have said, that any dividend or dividends made in his absence will be final; but he is not barred by any law from coming in at the latest time at which it will benefit him to come in, if his debt be, as in this case, one above all suspicion or doubt, though the lapse of a very long time might reasonably give rise to doubt and call for explanation: *Morris's Case*, Crabbe, 70.

The second question is answered by the statute, sect. 28, Rev. Sta. § 5097, which declares that such a creditor shall not interfere with former dividends, but shall be entitled to a dividend equal to that already received by the others, before any thing more is paid to them. I understand from the certificate that the assignee has funds enough to comply with the law, without disturbing former dividends.

Both questions are answered in the affirmative.

In re S. S. HOUGHTON.

JULY, 1874.

A creditor has no absolute right to appear and oppose the discharge of a bankrupt, after the return-day of the order to show cause, though the proceedings may have been adjourned for other purposes.

But it is within the power of the court to permit opposition to be made at any time before the discharge is granted.

If a creditor who has duly filed specifications of opposition to the bankrupt's discharge is about to withdraw them, there may often be good reason to permit other creditors to carry on the opposition.

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LOWELL, J. A creditor having the requisite qualifications filed his objections to the discharge of the bankrupt in due season, and now, after the time has passed for creditors to appear, another creditor asks leave to enter his appearance, and to be heard in support of those objections, if the original objector should decline to prosecute.

It is often highly expedient that such action should be taken, if it can legally be done. A judgment upon the question of the bankrupt's right to his discharge is a sort of judgment *in rem*, which establishes a *status*, that of a discharged or undischarged bankrupt, as the case may be, by which all persons interested are bound. In this respect it has much analogy to the petition by a creditor to have his debtor adjudged a bankrupt, in which proceeding our statute says that any creditor may come in and prosecute. Under the bankrupt act of 1841, and under the insolvent law of Massachusetts, neither of which contained any such express permission, it was held that from the nature of the case it was within the power of the court to authorize a new creditor to come in: *Foster v. Goulding*, 9 Gray, 50. And such is said to be the law of England: Avery & Hobbs, p. 346. It may be said that the analogy fails in this, that if a creditor could not come in to support a petition, he could immediately file a new one; but this is not an important distinction. One of the reasons for granting the application in *Foster v. Goulding* was, that it was too late to file a new petition.

Under sect. 5120 of the Revised Statutes any creditor may file a petition to have the discharge set aside for any frauds that were not known to him when the discharge was granted. This section has not often been construed. If it means literally that knowledge acquired before the date of the discharge will be an answer to the petition to annul it, then, I think, the court should be very slow to refuse a creditor the right to come in after the regular time and before the discharge is granted, if he had then first acquired the knowledge. My own impression is that the statute means knowledge acquired before the time for opposing the discharge; for that is the only time when a creditor is notified to make opposition. But if the other view should prevail, and sect. 5120 be taken literally, then there would be an absolute bar to a

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petition to set aside the discharge, although there had been no opportunity for the creditor to be heard.

I see that it has been decided that a creditor may appear not only on the return-day, but at any time to which the proceedings have been adjourned for any purpose: *In re Seabury*, 10 N. B. R. 90. This decision meets the difficulty sufficiently, and would admit the petitioner in this case; but it seems to me repugnant to the directions of rule 24 that the appearance shall be entered on the day when creditors are required to show cause, and that the specifications shall be filed within ten days thereafter, unless the time shall be enlarged by order of the district court. I have decided in one case that the discretion of the court to enlarge the time extends to the time for appearance, as well as to that for filing the specification, and may be exercised after the time has expired, as well as before; but I do not think it can be laid down as matter of law that the day when creditors are required to show cause means any day to which the proceedings may have been adjourned *for other purposes*. But I do think that the rule intends that the court should have power to enlarge the time whenever there is good cause shown for it. The distinction is between an absolute right imposing a corresponding duty upon the court, and a discretionary power to be exercised only upon cause shown.

I am further of opinion that there may often be good cause to permit a creditor to take up the opposition which another is about to relinquish. The practical consideration in this connection is, that a creditor, intending to oppose the discharge, may find that this duty has been assumed by another creditor; he examines the specifications, and considers them sufficient; perhaps he consults with that creditor, and finds him determined to prosecute the case. Suddenly he finds that the opposition is to be waived. This is the history of many cases. Opposition is very often withdrawn, and then the court can do nothing except to inquire *ex parte* whether any pecuniary consideration has been paid to the opposing creditor contrary to sect. 5110, clause 8. This safeguard amounts to nothing. It is probable that cases are settled every day in which that part of sect. 5110 is evaded; though no one undertakes to prove it, and the court cannot ascertain it. It is

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certain that creditors do oppose, for the purpose of obtaining an advantage; and I am afraid they often receive what they desire in some form, perhaps not technically open to objection. A creditor who is doing that would discourage others from coming in, because he would not care to share his advantages with them.

The statute prescribes no time within which the specifications are to be filed, but leaves that matter to be regulated by the supreme court; and the rule of court, as we have seen, gives a power to enlarge the time. There are reasons and analogies in favor of its enlargement, whenever the substantial rights of creditors will be hazarded by the settlement of the case by one creditor, who is in truth the representative of all the creditors.

I will not undertake at this time to lay down any rules for the application of this discretionary power. A great variety of circumstances may be found in the different cases. But it is obvious that among them may be the fact that the debtor has bought off the original objecting creditor after the time for filing specifications has passed; and this could not have been availed of before it occurred. No doubt many other cases may call for the exercise of the power. As the only question argued in this case was its existence, and the particular reasons for exercising it were not set out, I give ten days to the creditor to file an affidavit or affidavits, setting forth such reasons as he may have why he should be permitted to appear and oppose the discharge at this time.

C. P. Hinds, for the objecting creditor.

J. O. Teele, for the bankrupt.

NOTE. — Since the decision of this case, it has become the practice, in this district, to admit a creditor to support specifications already filed by another creditor, almost as of course, upon a suggestion that the opposition is to be withdrawn.

Re BUCKHAUSE. — Ex parte FLYNN.

JULY, 1874.

Where a firm, composed of A. and B., was indebted to a firm composed of B. and C., and the former firm became bankrupt, — *Held*, that C., as the remaining member of the latter firm, settling its affairs, could prove the debt against the assets of A. and B.

Re Buckhause. — Ex parte Flynn.

LOWELL, J. This case was submitted without argument. I understand that the firm of Buckhause & Gough, the bankrupts, were, at the time of their bankruptcy, indebted to the firm of Gough & Flynn, in a certain sum, for goods sold and delivered; and the question is, whether that sum can be proved as a debt. Gough was a member of both firms, but Flynn was not a member of the bankrupt firm, and he offers this proof as the solvent or remaining partner of his late firm, having the right to wind up its affairs.

It has for a long time been the law of England that proof may be made by one firm against the other in such a case. The firms are regarded as distinct legal entities, capable of contracting with each other in equity: *Story, Partn.* § 394; *Lindley, Partn.* p. 996; *Ex parte Thompson*, 3 Deacon & Ch. 612.

The English cases have gone beyond this, and have admitted contribution between the joint and separate estates, whenever there has been a distinct trade carried on, and the contract or dealing has been between "trade and trade," as they say; though the partners may have been the same in both firms, or though one firm may have included the other. The Massachusetts courts refuse to follow these last decisions, or to permit any proof between a firm and its members; but no court has denied the right of proof when the two firms had one or more distinct partners. In such a case a debt would exist, which, to be sure, could not be recovered at law, for a technical reason: *Bosanquet v. Wray*, 6 Taunt. 597; *Story, Equity*, § 679. But I apprehend the better opinion to be, that such a debt can be recovered in equity, without going into a general settlement of the accounts of both firms: *Story, Eq.* § 680; *Hayes v. Bement*, 3 Sandf. 394; *Calvit v. Markham*, 3 How. (Miss.) 343. A learned author has expressed a doubt whether there would be a remedy even in equity. He says: "In *Bosanquet v. Wray*, the court seem to have thought that in such a case there might be a remedy in equity. It is not, however, easy to see how such a remedy could be worked out, except as against the common partner by a dissolution of the claimant partnership. The court of chancery does not assume jurisdiction simply to compel payment of a debt, where there is no lien or charge to be

Re Lane, Brett, & Co. — Re Boynton.

enforced; nor, except in cases within its peculiar jurisdiction over trusts and the like, does it give relief, unless there is, or at some time has been, a legal right." Dixon, Partn. 268. But Story, at sect. 680, says: "Courts of equity, in such cases, look behind the forms of the transactions to their substance, and treat the different firms, for the purposes of substantial justice, exactly as if they were composed of strangers, or were in fact corporate companies." It cannot be denied that, 'in substance, a debt due from A. & B. to A. & D. is a very different thing from a mere overdraft by A. from the funds of A. & B. To refuse to notice the distinction is to disregard the credit of D. altogether. Whether there be a remedy in equity or not, while the firms remain solvent, it seems clear that there is a debt which equity can recognize, and which, in bankruptcy, ought to be entitled to its share of dividends, in justice to the creditors of the creditor firm. Indeed, the right to sue at law has been granted by statute in one State: Adams, Eq. (5th Am. ed.) 240, note 1, citing the laws and decisions in Pennsylvania. I have often decided that equitable debts may be proved under our bankrupt act, and I am not aware that a contrary decision has ever been made. Holding this to be a debt in equity, and finding the decisions in bankruptcy in favor of allowing its proof, I admit it, though without any intimation that, as between one partner, or any number of partners and the others, where there is no firm with a foreign member, the Massachusetts cases may not express the true doctrine for this country.¹ *Debt admitted to proof.*

In re G. H. LANE, BRETT, & CO. — In re C. H. BOYNTON.

JULY, 1874.

No proof can be made in bankruptcy between the joint and separate estates, in respect either of money drawn out, without fraud, by one partner, or of goods sold to him by the firm, though he was to sell them again.

Where money was advanced by A. to B., for capital in trade, with the understanding that B. should not be pressed for payment, but with no binding contract delaying or deferring payment, and no misrepresentation was made to B.'s cred-

¹ See the next case.

Re Lane, Brett, & Co. — Re Boynton.

itors, A. was held entitled to share in the dividends of B.'s estate, under a composition deed in the usual form.

Where A., holding several notes of B., exchanged some of them for notes of like amount of a firm in which B. was a partner, — *Seem*, this arrangement, if made in contemplation of bankruptcy, would be a fraud on the joint creditors; but, *held*, it could not be set aside when the bankruptcy of the firm occurred more than four months afterwards.

LOWELL, J. — 1. The first question is, whether the joint creditors of the firm can have recourse to the separate estate of Lane for money drawn out by him while the firm was solvent, with the assent of his copartners. The general rule in bankruptcy is, that there can be no proof between the joint and separate estates of partners, unless there is a surplus of the joint estate to be divided. This rule was adopted partly as being, upon the whole, the most equitable, on the supposition that the joint creditors had given credit to the joint estate, and the separate creditors to the separate estates, respectively; and partly, I apprehend, upon the consideration that there is no such thing as a debt between the partners, or between a partner and his firm, in respect to partnership matters, excepting upon a winding up of all the affairs; and it was found to be very expensive and inconvenient to go into a general accounting in bankruptcy, and it was thought more expedient, as well as more just, to take the estates as the parties left them: *Story, Partn. § 390*; *Lindley, Partn. p. 994*; *Harmon v. Clark*, 13 Gray, 114; *Houseal's Appeal*, 45 Penn. St. (9 Wright) 484.

2. The next question is, whether the firm creditors can have recourse to the separate estate for goods sold to one Boutwell, who was only a clerk representing Lane, and well known to be so. To the general rule above stated there are held in England to be two exceptions, one of which, that of a fraudulent withdrawal of funds, is foreign to this case; the second is, when there have been wholly distinct trades carried on by the partners, or by some of them, and the firms have dealt together. In one of the early cases, the same two persons carried on distinct trades at two different places, and the accounts were kept entirely distinct. One firm was conducted under the name of a clerk, who was not, as between the parties, a partner. The two firms had dealt with each other precisely as they would have done with strangers, and one firm was indebted to the other. A joint

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commission having been issued against the two partners, and the clerk, the lord chancellor, on petition, ordered that the commissioners should ascertain and declare the balance due from the one estate to the other, and that such declaration should be considered a good and effectual proof of the debt or balance, and that the assignees should transfer from the one estate to the other a ratable dividend in proportion with the other creditors: *Ex parte Johns*, 1 Cooke, B. L. 538. The two estates were settled as if they had been wholly distinct, probably upon the ground, or substantially that, of apparent ownership; and it would seem that, so far as third persons were concerned, one firm had a partner who was not in the other, which would bring it within the category of two firms having one or more partners in common, but not all, in which the right to prove is generally admitted. See *Buckhause & Gough's Case*, decided by me a few days since.¹ The English cases go beyond this, and permit proof where there has been a dealing between the two firms in the way of trade, though one of the firms included all the partners in the other: *Ex parte St. Barbe*, 11 Ves. 413; *Ex parte Hesham*, 1 Rose, 146. But they confine it strictly to a dealing between trade and trade; and, if it amounts merely to an advance of money by a firm to one or more of its partners, or by partners to the firm, will not consider it a debt, even though the creditor-partner carries on the distinct trade of a banker: *Ex parte Sillitoe*, 1 Glyn & J. 374; *Ex parte Williams*, 3 M., D. & De G. 433. The supreme court of Massachusetts refused to admit the exception, and rejected the proof offered by the joint against the separate estate, even when there was a distinct trade: *Somerset Potters' Works v. Minot*, 10 Cush. 592. It seems to me that the Massachusetts doctrine is the better one. In the case of *Buckhause & Gough*, above mentioned, I admitted the proof, because the firms were really different; so that a debt was actually created from one to the other which could be recovered in a court of equity, without winding up either firm; but the sale of goods by the firm in this case to one of the partners, appears to be nothing more than an advance to him, as partner, which might, and must

¹ *Ante*, p. 831.

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be, brought into the general account. If so, it has not the characteristics of a debt in bankruptcy, unless we repeal the general rule, and wind up all the estates, as upon an ordinary dissolution of copartnership, which has not been asked for in this case. The nice distinctions taken in England have led to uncertainty, and the simple rule, not to go into the accounts between partners, seems to have been broken without sufficient necessity. The mere difference between a credit for money and one for goods is not, in my judgment, substantial enough to support an exception.

3. The third question submitted to me by the written agreement of the parties is, whether the separate estate of G. H. Lane can share in the dividend which is to be made under the trust deed, by which the affairs of J. H. Hobart are wound up. The deed was made for the benefit of all the creditors of Hobart, to save the expense of proceedings in bankruptcy. The objection taken by Hobart's creditors is, that the money advanced by Lane was capital, and was to be paid only out of the profits of the business. Lane was not a partner, nor held out as such; nor was any creditor informed, so far as the evidence discloses, that any such arrangement as is said to have been made, was made. There is no evidence, therefore, of any thing which should estop Lane, or his assignees, from sharing the dividend. The only question is, whether there was a binding contract between the parties that Lane should be paid only out of the profits of the business, so that if he himself, remaining solvent, had sued Hobart, it would have been a good plea, in law and fact, that the defendant had not yet realized the money from the profits of his business. I do not find such a case to be made out. Hobart had been a salesman for Lane, and, partly from friendship and partly from the hope of having a good customer, Lane advanced him the money for his stock, with an understanding, probably, that he should not be pressed for repayment. It would have been useless to set up the business if the capital was to be taken away immediately, and no doubt Hobart expected to have the use of the money for an indefinite period; but, when all the parties failed, and the business came to an end, Lane appears to be fairly one of his creditors in respect to the capital. There are, as I have said, no equities in the case.

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4. The fourth case is that of the notes held by Mrs. Luther against the firm of C. H. Boynton & Co., a firm consisting of Boynton and George H. Lane. Mrs. Luther had several notes of Lane, part of which were to be paid about the time of the great fire, which destroyed a large amount of the property of the firm of G. H. Lane, Brett, & Co. After the fire the firm was insolvent, and made an offer of compromise to the joint creditors, which they were disposed to accept. After this Mrs. Luther exchanged a part of the notes, at Lane's request, for notes of C. H. Boynton & Co., more than four months and less than six months before the bankruptcy of the latter firm. It is insisted that both Lane and C. H. Boynton & Co. were insolvent when these notes were given, and that the intent was to withdraw funds from the assignees of the firm. The insolvency of Boynton & Co. is denied. The notes were given with the assent of Boynton, and were no fraud on him; but they would have the effect, when paid, of withdrawing a part of the amount which stood to the credit of Lane in the books of that firm, which was considerable. It was understood, I think, by the partners, as being such a withdrawal. Such an arrangement, if bankruptcy follows, would have the effect to diminish the aggregate of debts to be proved against the separate estate of Lane, and increase that against the joint estate of C. H. Boynton & Co., and thus to operate a fraud or injustice upon the joint creditors. Where a separate creditor had obtained a joint indorsement of his notes, after the partners were actually insolvent, and within six months of their legal insolvency, he was not permitted to prove against the joint estate under the Massachusetts statute: *Phillips v. Ames*, 5 Allen, 183. In three cases I have held that an arrangement by which property was changed from joint to several, after insolvency, and within four months of bankruptcy, was voidable.

This case differs from any I have decided, because here was no change, conveyance, or disposition of property or assets of any kind, to bring it within the words of sect. 35 of the statute. It is an arrangement of the debts by which, in case of bankruptcy, an advantage may be obtained by a separate creditor to the injury of the joint creditors. As it happens in this case that the separate bankruptcy was begun within four months, and the

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joint bankruptcy after four months and within six months of the transaction, a very important question arises in respect to the limitations of sect. 35. No doubt the effect of the exchange is to prefer a separate creditor; and, if there were a surplus of the joint estate, Lane's separate creditors would have their share, and thus it might happen that not only was the separate creditor preferred, but the separate estate diminished. But I understand the facts to be otherwise in this case, and I cannot hold that the separate creditors are to be permitted to complain, nor do they complain, of an act which has not only been of no damage, but an actual advantage, to them.

In this case, the loss is suffered by the joint creditors, whose dividend will be diminished if this debt shares with theirs; and, if this is a voidable act, as was held in the case cited from 5 Allen, 183, is it one that is cured by the lapse of four months? In my opinion, it is. The constructive fraud is more like a preference than any thing else. No doubt the second clause of sect. 35 is broad enough to include preferences; but as they are specially mentioned in the first clause, and with a different limitation, we must construe the second so as to omit them. Now, if the partners, instead of giving their note, had paid the money, it seems to me the true description of the act would be, that it was a preference, if not as to the separate creditors, then as to the joint creditors. It was taking part of their money to pay one debt in full. Mrs. Luther was not a creditor of the firm; but a payment to her would not be a mere gift. I think she, being a separate creditor, has enough of the character of a creditor to be preferred by the firm, and that the payment to her might be avoided as a preference; and it is rather of that character than a general fraud on the assignee.¹

The directions, then, will be: —

1. *Proof between the joint and separate estates of G. H. Lane, Brett, & Co. is rejected, in respect to both charges, i.e., of money drawn out and of goods sold.*
2. *The assignees of G. H. Lane are entitled to share in the assets of J. H. Hobart.*
3. *The Luther notes may be proved against the joint estate of C. H. Boynton & Co.*

¹ See *Halbur v. Nevill*, L. R. 4 C. P. 354; 5 C. P. 478.

Re Kelley.

In re PETER KELLEY.

SEPTEMBER, 1874.

A judge of the United States has authority to issue his warrant for the arrest of a supposed criminal, under the extradition treaty with Great Britain, and the statutes passed to aid in carrying that and similar treaties into effect, when due complaint is made to him, without a previous application having been made to the president.

In the treaty of 1842 with Great Britain, 8 Stats. 576, manslaughter is not one of the enumerated crimes, and it is not included in murder, which is therein mentioned.

EXTRADITION. — Hearing before the district judge upon a complaint charging Kelley with murder committed on board a British vessel on the high seas, and asking for his extradition.

LOWELL, J. I issued the warrant upon a sworn complaint made by H. B. M. consul at the port of Boston; and gave at length my reasons for not requiring a mandate from the president of the United States, to precede the arrest. The practice at this time in the second circuit was to wait for such a mandate: *Kaine's Case*, 3 Blatch. 1; *Heinrich's Case*, 5 id. 414; *Farez' Case*, 7 id. 34; and I explained how that practice had arisen, and endeavored to show that it was unsound. As the practice of the second circuit has been changed, and accords with that of the first, and of all the others so far as I know, and as the treaty and statute are plain, I have not thought to print the argument, but merely reaffirm the point. See *Re McDonnell*, 11 Blatch. 39.

Upon the evidence I find that the crime committed was manslaughter; and this is not within the treaty, which mentions only murder, assault with intent to commit murder, piracy, arson, robbery, and forgery. It was suggested that murder might include manslaughter. But considering that both the law and the language of the two countries are alike, and that the treaty describes well-known crimes by their technical names, this construction is inadmissible. As well might we hold that robbery includes theft; or piracy, mutiny. In an extradition treaty the greater crime

Re Griffiths.

does not include the lesser, because the intent is to deliver up great criminals only ✓

F. Dabney, for the petitioner.

W. A. Hayes, Jr., assistant district attorney, for the complainant.

Prisoner discharged.

In re GRIFFITHS.

SEPTEMBER, 1874.

Sect. 9 of the statute of 22d June, 1874, concerning the conditions upon which a discharge is to be granted to bankrupts, applies to cases pending when the act was passed.

Such a statute is not retrospective in the legal sense.

LOWELL, J. The question presented by the register's certificate is whether sect. 9 of the act of June 22, 1874, 18 Stats. 180, which dispenses with the consent of creditors to the bankrupt's discharge in compulsory cases, applies to pending cases. It was settled by several decisions in Massachusetts that such amendments of the law affected all cases: *Ex parte Lane*, 3 Met. 213; *Eastman v. Hillard*, 7 id. 420; *Re Bartlett*, 8 id. 72; *Eddy v. Ames*, 9 id. 585. But as the law has been pronounced to be otherwise in relation to this statute, in an able opinion of Judge Blatchford's, I feel bound to give briefly my reasons for agreeing with the earlier decisions.

Sect. 9 says, in substance, that in cases of compulsory bankruptcy the provisions of the former laws requiring the payment of a certain proportion of debts, or the assent of a certain number of creditors, as a condition of a bankrupt's discharge, shall not apply; but if otherwise entitled, he is to have the discharge without such payment or assent. And in cases of voluntary bankruptcy no discharge shall be granted to a debtor whose assets shall not be equal to thirty per cent of the debts proved against his estate, upon which he shall be liable as principal debtor, without the assent of at least one-fourth of his creditors in number, and one-third in value; and the provision in sect. 33

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of the principal act, requiring fifty per cent of such assets, is repealed.

It is plain, I think, that the section, on the face of it, applies to all cases in which a discharge is applied for after the passage of the act. It was so explained to the house of representatives by Mr. Tremain, who had the bill in charge: Congressional Record, June 17, 1874, p. 60; and the words are almost precisely like those of the statute, which was so construed in *Ex parte Lane*, 3 Met. 213, in which Wilde, J., speaking for the court, said: "The court can have no authority to grant a discharge against a prohibition in the statute." And the other cases cited are similar. In all, the law was changed without any express application to future or past cases, and the court unhesitatingly applied it to both classes.

This construction is aided by the express words of repeal which are found in sects. 9 and 21. The repeal is unqualified, and I know of no rule which will authorize me to limit the scope of the enactment of repeal, unless it were, indeed, to save rights or titles already vested. And this brings me to what I venture to call the fallacy that such a change in the bankrupt law is retroactive if it is made to affect pending cases. A law which discharges debts already contracted may well be called retroactive; and this law, if retroactive at all, would be so not merely as to cases begun, but as to contracts entered into before its passage. But it is well settled that a mere modification of the conditions upon which a discharge shall be granted to bankrupts, is not retroactive. "It is clear," says the eminent jurist already quoted, "that the appellant had no vested right to a discharge at the time of filing his petition. Such a right could be acquired only by proving, at the time of applying for a certificate of discharge, that he had in all respects complied with the provisions of statutes 1838 and 1841 [the latter of which was passed after he had been adjudged an insolvent], by which only a right could be acquired. The latter statute, therefore, is not to be considered a retrospective act, disturbing vested rights, but as altogether prospective in its operation, although it [the discharge] might depend, in some cases, upon acts done before it took effect." 3 Met. 215. The definition of a retrospective statute is: one

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which impairs vested rights or imposes new duties or disabilities in respect to transactions already passed: *Society, &c. v. Wheeler*, 2 Gall. 104, adopted by Sedgwick, Stat. L. 188; Smith, id. 289. This law is not retrospective in that sense.

The statute in *Ex parte Lane* was much more like a retrospective act than is that of 1874, because it actually deprived the insolvent of a discharge for a preference given before the act went into operation. This law neither creates new frauds nor relieves a bankrupt from the consequences of any which he has committed, but merely lightens somewhat the arbitrary conditions before imposed on honest bankrupts as a preliminary to obtaining a certificate. Such a law is always held to be remedial: *In re Billing*, 2 N. B. R. 512; *Revere v. Newell*, 4 Cush. 587.

It is said that one section of the amended act explicitly declares its applicability to pending cases, and another limits itself to cases begun after a certain day. This is true of those sections. But most of the sections leave the matter to interpretation, and must be judged by the subject-matter. Thus, sect. 14 says that all proceedings may be discontinued upon the assent of a majority of the creditors. There can be no doubt that this covers all cases, whether begun before or after June 22. To settle a case in that way may disappoint some hopes of creditors, but it is remedial, and disturbs no vested rights. So of the section now under consideration. The words seem plain to my apprehension; and the cases cited show how such laws have usually been understood.

I do not mean that there may not be many pending cases which have passed the stage at which the law would be applicable to them, in which, for instance, the debtor or the creditors may have been already entitled to a decree, which only remained to be formally pronounced when the new law went into operation. But, speaking generally, I say that the law was prospective, and applied to all cases in which the actual right had not been acquired, and that all inconsistent acts are unconditionally repealed.

Discharge granted.

Re Pierce. — Ex parte White.

Re E. C. PIERCE & AL. — Ex parte E. A. WHITE.

NOVEMBER, 1874.

A mortgage given to a surety to indemnify him for undertaking to secure debts of a mortgagor, who afterwards became bankrupt, will be held, by a court of bankruptcy, to inure to the benefit of the creditors to whom the surety became bound; and the trust for the benefit of such creditors will be enforced by those courts.

Where such a mortgage is assigned to a purchaser, with notice of the trust, he takes the property upon the same trusts.

Where the money paid by such a purchaser is, in fact, applied to the payment of the debts which the mortgage was given to secure, the purchaser may have the benefit of such application.

But if the purchaser is himself a creditor under the mortgage, he has no priority over the other creditors, but must share with them if the security is inadequate to full payment.

An assignee in bankruptcy, who has taken chattels subject to such a mortgage, has no prior lien on it for rent of the place in which they were kept, if, being notified of the mortgage, he refused to deliver them to the mortgagee, and the rent accrued after such notice.

BANKRUPT. — SECURITY TO SURETY. — The bankrupt firm carried on business in Boston under the style of the Boston Drug Mills, as the successors of an earlier firm, consisting of the two bankrupts and one Lincoln. When the latter retired from the firm in December, 1872, the new firm undertook to pay the joint debts of the old firm, and they procured one Kendall to become bound with them to Lincoln in an obligation conditioned to pay all said debts as shown on the books of account of the firm, and especially six certain promissory notes, amounting to \$3,400, signed by said Lincoln and indorsed by the Boston Drug Mills, and to save harmless said Lincoln against all said debts, liabilities, and notes. As security for this obligation, the new firm gave Kendall, the surety, a mortgage upon certain machinery, tools, and other chattels, which was conditioned to pay all the debts of the old firm, and to indemnify Kendall from his liability on the bond.

In February, 1873, the new firm applied to Mr. White, the petitioner, to advance them \$1,500, promising to procure him as security therefor an assignment of Kendall's mortgage. He advanced the money and received the assignment.

After the bankruptcy of the Pierces, White applied to have

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the mortgaged property sold, which was ordered, subject to the rights of all parties, and the assignee filed an account, showing a balance of about \$1,000 as the net proceeds of sale.

At the hearing there was evidence tending to show that the money thus obtained from Mr. White was applied to pay debts of the old firm. There was evidence that the notes for \$3,400, mentioned in the mortgage to Kendall, had not been paid, and that there were other debts outstanding of the old firm; that Kendall and Lincoln were both bankrupt, and the interests of their creditors were insisted on by their assignees.

B. C. Moulton, for the assignee.

G. W. Estabrook, for the secured creditors.

LOWELL, J. It is well settled that a mortgage by a principal to a surety to indemnify him for his undertaking, will inure to the benefit of the creditors to whom the surety has become bound, and that if the parties are bankrupt, the court of bankruptcy or a court of equity will enforce the trust for the benefit of such creditors. I refer to the very elaborate opinion of the late Judge Hall, in *Re Jaycox & Green*, 8 N. B. R. 241, where the authorities are reviewed, and the principle upheld; and in which the character of such a transaction as a trust is fully set out. In England this equity appears at the present day to be confined to cases in which both the principal and his surety are bankrupt or insolvent, and is held not to inure to the benefit of the class of creditors as such, but to be an incidental advantage which they obtain in working out the settlements of the two bankrupt estates. The earlier English doctrine of *Maure v. Harrison*, 1 Eq. Cas. Abr. 98, pl. 5. has been more closely followed in this country, and the better opinion here is, that when the principal is insolvent, the creditors may at once require the application of the security. Kendall's mortgage, however, was conditioned to pay the debts of the old firm, as well as to save him harmless therefrom, which would create a trust, even before bankruptcy; and both parties are now bankrupt. Kendall assigned this mortgage to a person who was lending money to the new firm. It is clear that such an assignment, for such a purpose, of a mortgage which clearly expresses the trust, is void in equity, and that White became merely the trustee in the place of Kendall. No layman even, reading such a mortgage, could for a

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moment suppose that it was intended, or could be used, as a security for new debts, at least until the old debts were all paid ; and White made no inquiry concerning the old debts.

Fortunately for him the money appears to have been used to pay old debts ; and this being the case, he may fairly claim to stand in the place of the creditors who were paid with the money which he lent. But his possession of the mortgage gives him no better right than all the other creditors of the old firm, because it was not assigned him for any such purpose.. He was not responsible for the old debts, and did not undertake to pay them, and can only by subrogation claim the rights of a creditor.

If Kendall had paid certain debts without notice of the insolvency of the new firm, no doubt he might hold the mortgaged property, first to indemnify himself, and next to divide the proceeds of the property *pro rata* among the remaining creditors. But White was not in this position. He advanced money on a security which was not directly available to him, and he can derive no priority by the fact that he held a legal title.

It was argued that the holders of the notes mentioned in the mortgage are to have precedence of the other creditors of the old firm, by reason of the notes being specially referred to. But it is evident that these debts were not mentioned for that purpose, but merely to make sure that they were acknowledged as debts by the old firm. The bond and mortgage cannot be misunderstood. They are for all the debts, whether mentioned in the mortgage or shown in the books.

The assignee argued that he had a lien upon the mortgaged property for rent. It seems that the drug mills were in his possession for some time, and that the landlord makes some claim against him which is in suit ; and the suggestion is, that if the machinery and tools conveyed by the mortgage had been removed, he would not have kept the premises so long as he did. If the assignee has become liable for rent, he has usually the right to pay it out of the assets in his hands ; but, so far as this mortgaged property can be called assets, he has no claim of this sort upon it, because he resisted the mortgagee's right to sell or remove it, gave him no notice of any such possible claim, and has acted throughout adversely, taking his chance of setting

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aside the mortgage. Besides, the occupation of the premises was optional with the assignee. He was not bound to take the lease unless he pleased, and he might have taken care to secure himself by a guarantee from the creditors or otherwise against personal liability for the rent. If he did become liable he cannot call upon the mortgagee, or rather on the creditors of the old firm whom the mortgagee represents, to pay any part of this charge.

The order is, that the net proceeds of sale of the mortgaged property be divided among the creditors of the old firm, known as the Boston Drug Mills, pro rata.

T. F. NUTTER v. J. S. WHEELER ET AL.

NOVEMBER, 1874.

The principal of a bankrupt factor may recover from the assignee any goods remaining unsold, or any proceeds of sale of such goods which the assignee has sold, or which can be specifically distinguished from the property of the bankrupt.

A consignee, by the terms of his agency, may be the agent of the consignor until the consigned goods are sold; and, when they are sold, become, as between him and the consignor, the purchaser of and principal debtor for the goods sold.

ACTION OF CONTRACT by the assignee in bankruptcy of A. S. Gear to recover \$627, alleged to have been received by the defendants to the use of the plaintiff. The case was, by consent, tried by the court without a jury. The facts, as found by the judge, were these:

The defendants were manufacturers of machinists' tools at Worcester, and Gear had a shop in Boston, where he sold such tools, among other things. The defendants were in the habit of sending their manufactured goods to Gear, and he sold them at such prices and to such persons and on such terms as he pleased, not less than the trade prices fixed by the defendants; whenever he had sold any tools, and not before, he was to pay the defendants, in thirty days, the prices shown in the list, less an agreed discount. The defendants had the right to sell any goods which at any time remained in his shop unsold, and he was permitted to sell any of their goods at the factory, and the defendants

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would then deliver them according to his order, and charge him with the trade price less the discount. Instead of paying in thirty days, Gear would sometimes give his note for the balance due ; and the defendants held one such note at the time of his bankruptcy.

In December, 1873, Gear ordered three drills to be sent by the defendants, from their factory at Worcester, to the New York Central Railroad Company, at three different machine-shops of that company, in the State of New York. They were sent, and a bill was made out to Gear, as the purchaser, for the trade price of \$600, less fifteen per cent, and sent him in a letter, in which the defendants say they had taken off fifteen per cent, and hope to get the cash in thirty days.

In January, 1874, Gear failed ; and the defendants took back the tools of their manufacture, then in his shop in Boston, unsold. In February, 1874, Gear went into bankruptcy, and at the first meeting of creditors the defendants proved against his estate for the amount of his note, above mentioned, and for the price of the three drills. J. S. Wheeler, one of the defendants, was chosen assignee. Finding that the railroad company had not paid Gear for the drills, the defendants collected the price, giving to the company the receipt of J. S. Wheeler, the assignee. Wheeler afterwards resigned his trust as assignee. This suit was brought by the successor of Wheeler, as assignee, against the firm of J. S. Wheeler & Co., for money had and received. The defendants filed a petition to amend their proof, as having been made by mistake of fact and law.

E. Avery & T. F. Nutter, for the plaintiff.

N. Morse & A. Jones, for the defendant, cited *Barry v. Page*, 10 Gray, 398 ; *Audenried v. Betteley*, 8 Allen, 302 ; *Learned v. Johns*, 9 id. 419 ; *Swan v. Nesmith*, 7 Pick. 220.

LOWELL, J. It has been settled for a very long time that, upon the bankruptcy of a factor, his principal may recover from the assignees any of the goods remaining unsold, or any proceeds of the sale of such goods which the assignees themselves have received, or which remain specifically distinguishable from the mass of the bankrupt's property. The action may be brought at law as well as in equity, subject, of course, to the factor's lien

for advances or commissions: *Scott v. Surman*, Willes, 400; *Ex parte Chion*, 3 P. Wms. 187, n.; *Kelly v. Munson*, 7 Mass. 319; *Tooke v. Hollingworth*, 5 T. R. 215; and it makes no difference that the factor acted under a *del credere* commission, or sold the goods in his own name: *Thompson v. Perkins*, 3 Mason, 232; *Barry v. Page*, 10 Gray, 398; *Audenried v. Betteley*, 8 Allen, 302.

A like doctrine is applied to bankers, who, if they have received notes or bills from their customers and have not discounted them, will not usually be held to have acquired the property in them; and if the banker becomes bankrupt, his assignees are liable to the customer for the bills, or their distinguishable proceeds, subject to the lien for advances: *Thompson v. Giles*, 2 B. & C. 422; *Ex parte Barkworth*, 2 DeGex & J. 194; *Stetson v. Exch. Bank*, 7 Gray, 425.

The important question, therefore, in this case is, whether the defendants and Gear stood in the positions, respectively, of principal and agent in this transaction of the sale of three drills. Upon the first view of the correspondence and the acts of the parties, it appears a simple case of sale to Gear of goods delivered to a third person at his request. And the defendants found some difficulty in stating their case in such a way as to take it out of this category. In their application to withdraw this part of their proof in bankruptcy, they say it ought to have been put, not as a sale, but as a consignment or delivery of the drills to Gear, or his order, for sale by him on their account, on commission. It was not a consignment, certainly, and Gear never for an instant had the possession or property, general or special, of the goods.

The defendants, however, appeal to the course of business between the parties to prove that it was a sale on commission. The bankrupt and the defendants, being examined as witnesses, disagreed about the conversation which took place at the beginning of the business connection between them; but the very voluminous correspondence shows clearly enough what the actual mode of dealing was. And it is plain that the goods sent to Boston by the defendants, from time to time, remained their property until they were sold, and that when a sale occurred Gear became immediately the debtor at a fixed price, and was

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bound to pay at a definite time, and that he never consulted with them about terms or purchasers, or any thing else, except the variations of the trade price; never accounted to them or was expected to account as agent, or was subject to their directions, excepting as to the tools remaining in his hands undisposed of. As to those goods sent to Boston, he may be described as a bailee, having power to sell as principal. Until a sale was made, the property in the goods remained in the defendants, and they were well justified in reclaiming those which remained on hand at the time of the failure of Gear.

But after the goods were sold, the agreement appears to have been that Gear's credit only was looked to. Perhaps there were conveniences in this mode of conducting the business. Whatever profit or loss Gear might make, or whatever credit he might give, the defendants had a fixed price and a fixed time of payment. He never consulted them about his sales, or rendered any account of sales. The prohibition against selling below the trade price is a very common one between a manufacturer and those who buy of him to sell again, and is intended to prevent a ruinous competition between sellers of the same article. I have often known this arrangement to be made by a patentee and his various licensees. It has but little tendency to prove agency.

The question of agency is mooted usually either between the principal and the third person, or between that person and the supposed agent; but the real inquiry in all the cases is, whether the credit was given to the person sought to be charged by the person seeking to charge him. Thus, when the defendants were suing the railroad company, the liability depended on the fact of credit having been given them by the defendants, either directly or through their agent, Gear. The terms of the sale by Gear to the company were not proved, but it was taken for granted by both parties that he sold as a principal; and that this was so, is shown by the fact that the company insisted upon the receipt of his assignee.

I will now examine some adjudged cases. Where a trader, having a contract with government to supply a large amount of candles, asked a friend, who had candles of the required quality, to accommodate him with some, which the friend assented to, pro-

vided the bills should be made out in his name ; and the trader delivered the candles (as the court inferred) in his own name, and his assignees in bankruptcy received the price ; it was held they must pay it in full to the owner of the candles : *Ex parte Carlon*, 4 Dea. & Ch. 120. But it was taken for granted by the judges, that, if the owner had intended to trust the trader's credit, he could not have intervened after the bankruptcy, but must have proved against the assets as for goods sold.

So, in the cases about bankers, it has been said that if the agreement were that the bills should be the property of the banker, then, whatever might be the hardship of the particular case, his assignee in bankruptcy could hold them : see remarks of Eldon, L. C., in *Ex parte Sergeant*, 1 Rose, 153, explained in *Ex parte Barkworth*, 2 DeGex & J. 194.

The late English case, *Ex parte White*, L. R. 6 Ch. 397, is on all fours with this. With a change of names, the course of dealing described in that case would do for this, in respect to the goods sent to Gear and sold by him in Boston ; and the precise question came up, whether, after the goods had been sold, the bankrupt was to account as agent. The court decided that the agency continued only up to the time of selling the goods ; and, when they were sold, the bankrupt himself became the purchaser, as between him or his assignees in bankruptcy and the consignor of the goods. The learned justices say that this mode of conducting business is a usual one, of great convenience to the parties, and they carefully and ably distinguish the contract from one of a sale by an agent, even with a *del credere* commission. That case was to be taken to the house of lords, but I cannot find that it has been decided there. Whatever may be its fate in that court, I consider the decision of the lords justices a sound one.

The case of *Audenried v. Betteley*, 8 Allen, 302, has been cited by the defendants. There the plaintiffs agreed to "stock" the wharf of the bankrupt with coal and wood, and the bankrupt was to make sales at prices fixed by the plaintiffs. He agreed to carry on no other business ; to keep books which should always be open to the inspection of the plaintiffs ; to guarantee the sales ; to account monthly, &c. The contract was evidently drawn with a view to keep the whole business under the plain-

tiffs' control, without making them liable for the debts of the bankrupt; and in providing for these objects it ran some risk of making the bankrupt a mere purchaser. But the court held that he was an agent. That case differs from the case at bar as much as the English case resembles it. Here, none of the circumstances are found from which an agency was there inferred. Gear did not render an account of sales; did not agree to guarantee sales, nor to keep books, nor to sell at prices to be fixed by the defendants, excepting as to the *minimum*, which has been already explained.

If the relation of the parties was such as I have considered it, then, even as to the goods which had once been consigned to Gear, he should be considered as the purchaser, subject only to the understanding that he was neither the owner of them, nor liable to pay for them until he had succeeded in finding a purchaser; but when he did sell, he immediately became the principal, and the defendants ceased to have the rights of a consignor, and could not follow the goods or their proceeds as undisclosed principals.

If this is so, then the transaction now under review, which, standing alone, appears to be a sale to Gear himself, and not a sale through him as agent, is not shown to be any thing else by the course of trade between the parties. But even if the goods which had once been consigned to Gear should be held to be sold by him as agent or factor, I doubt if such sales as this could be so considered.

The defendants, then, have collected money which belonged to the estate of Gear. They collected it by action; but as they had no right to collect it, they cannot deduct the expenses, unless they would have been necessary and proper costs of a recovery by the assignee if he had brought the action. In the settlement with the railroad company they were obliged to give the receipt of one of the firm as assignee, and there is no evidence that he could not have had the money in the first instance upon such a receipt. The expenses, therefore, were incurred in their own wrong. They must pay to the present assignee the price the railroad gave for the drills, which I understand to be \$610.

Judgment for the plaintiff.

Re Noyes.

Re G. N. NOYES.

NOVEMBER, 1874.

A bankrupt, under examination by a creditor, is entitled to make any explanation or additional statements which may be necessary to complete and make clear any matters concerning which he has been examined; and, to this end, may be questioned by his counsel. He is not bound to pay the fees of the register for taking this part of the examination.

The cases of *Scofield v. Moorehead*, 2 N. B. R. 1, and *Re Mealy*, 2 N. B. R. 128, remarked on.

The question whether an examination is so far completed as to be admissible in evidence is not one which can properly be certified to the court for decision by the register taking the examination.

BANKRUPT. — EXAMINATION. — A creditor procured an order for the examination of the bankrupt, and proceeded therewith before the register. In the course of his direct examination questions were asked about his books, and he testified that they were kept by his son, who could explain them. He agreed to produce certain books in addition to those already before the register, and to procure the attendance of his son. After an adjournment, the bankrupt attended with the books and with his son. The creditor, not caring to examine further, the bankrupt desired to complete his answers to certain questions already put. Both parties refused to pay the fees for such additional examination, and the register certified the following questions: —

1. Who, if any one, should pay, secure, or become responsible for the fees of the register, for the further examination of the bankrupt?

2. Has the creditor the right to use the examination, as it is, against the bankrupt?

G. W. Morse, for the creditor, cited *Scofield v. Moorehead*, 2 N. B. R. 1; *Re Mealy*, id. 128.

T. H. Talbot, for the bankrupt.

LOWELL, J. A bankrupt under examination has the right to be cross-examined, or further examined, in his own behalf, after the creditor or assignee is done with him, so far as may be necessary to explain or qualify any matters brought out on the direct examination, which may seem to bear unfavorably upon

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his conduct or dealings, or which are obscure. The statute, at sect. 4, provides that the fees of the registers shall be paid by the parties for whom the services are rendered. From this it has been ruled, by two learned judges, in the cases cited at the bar, that the bankrupt must pay for that part of his examination above referred to. But this conclusion seems to me unwarranted. In the sense of the statute, the creditor is the person for whom these services are rendered. It is he who procures the examination; and it is a part of it, essential to justice and fair dealing, that the party examined should not be left under unfounded imputations, arising out of an ignorant or a too subtle course of interrogatories. The same section which authorizes this proceeding gives a like power over every person within the jurisdiction; and can it be maintained for a moment that any person summoned to disclose his dealings with the bankrupt is to pay for the privilege? A bankrupt is presumed to have surrendered every thing, until the contrary appears; and I cannot assent to the proposition, that he is to pay out of his current earnings for the satisfaction of clearing up and making perfect his examination.

The danger that has been anticipated of a frivolous or useless prolongation of the examination, if it is to be conducted at the expense of the creditor or assignee, appears to me wholly imaginary. The whole proceeding, including an ultimate visitation of costs upon any one whose conduct is vexatious, is fully within the power of the court; and, as matter of fact, no case has ever occurred in this district in which complaint has been made on that side of the controversy, though bankrupts have sometimes thought that they were harassed with unprofitable investigations. In one of the cases cited, the late Judge Hall, whose learning was as conspicuous as his conscientious and laborious care to investigate the merits of every case brought before him for judgment, appears to have been influenced by this consideration, which experience has proved to be unfounded.

In the case last referred to, it was said to be according to the chancery practice, that costs of the cross-examination of witnesses were paid by the party conducting the cross-examination. Such is not the practice in the federal courts; and the reasons

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for it do not apply to the examination of a bankrupt or other person examined under sect. 26 of the bankrupt act.

The second question, whether the examination, as it stands, can be used against the bankrupt, is not one properly arising in the course of his examination, and must be answered by the judge before whom the examination may hereafter be offered, if it ever should be offered in its present condition.

This opinion is to be certified to the register.

THE MARY CELESTE.

DECEMBER, 1874.

Where absolute forfeiture to the United States is the statute penalty for an act, the title accrues when the penal act is committed.

If the forfeiture is alternative, property or its value, the title does not vest until the election is made. Meanwhile, an innocent purchaser may acquire a title not subject to forfeiture by subsequent seizure.

Under Stat. 18 July, 1866, § 24, 14 Stats. 184, "If any certificate of registry . . . to any vessel shall be knowingly and fraudulently obtained or used for any vessel not entitled to the benefit thereof, such vessel, with her tackle, apparel, and furniture, shall be liable to forfeiture," the forfeiture is an absolute one, and vests the property in the United States when the fraud is committed. "Liable" only implies that the United States may not discover or may not enforce the forfeiture.

If the papers, by means of which such registry is obtained, are identified, and come from the possession of government, it is not necessary to prove the signature to each paper.

LIBEL FOR FORFEITURE. — The United States seized the brig Mary Celeste, July 9, 1872, and at once filed a libel against her as forfeited; alleging that in December, 1868, Richard W. Haines, the then owner of said brig, knowingly and fraudulently obtained a certificate of registry for said brig, to the benefit of which she was not entitled.

The answer denied the allegations of the libel; and further averred that the claimants were *bona fide* purchasers of the brig since the certificate was obtained, and without notice of any fraud. No objection was taken to the very general form in which the charge was made in the libel. There was evidence tending to show that the brig came into the port of New York

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in November, 1868, from Matanzas; that she was then the British brig *Amazon*; that she was sold at auction on or about Nov. 28, and bought by R. W. Haines, an American citizen and shipmaster, for \$2,800; that she was repaired by him, at a cost of about \$10,000, and was not worth much more than the cost of the repairs; that Haines applied to the secretary of the treasury to issue a register to the brig, under the statute of Dec. 23, 1852, 10 Stats. 149, which authorizes such action when a foreign-built vessel is wrecked in the United States, and bought and repaired by a citizen thereof; provided it shall be proved to the satisfaction of the secretary that the repairs amount to three-fourths of the value of the vessel when repaired. The application was granted, and a register was issued to the brig, under the name of the *Mary Celeste*. The government maintained that the brig never was wrecked in the United States; and introduced evidence that she arrived in New York from Matanzas without any appearance of having been wrecked, and that the protest and port-warden's certificate forwarded to the secretary of the treasury were false and fraudulent. There was evidence that the present owners of the brig bought their respective shares innocently.

The forfeiture was said to have accrued under sect. 24 of the act of 18th of July, 1866, 14 Stats. 184: "that, if any certificate of registry . . . to any vessel shall be knowingly and fraudulently obtained or used for any vessel not entitled to the benefit thereof, such vessel, with her tackle, apparel, and furniture, shall be liable to forfeiture."

G. P. Sanger & P. Cummings, for the United States.

M. F. Dickinson, Jr., for the claimants.

LOWELL, J. The first question is, whether the papers said to have been forwarded to Mr. McCulloch, secretary of the treasury, are duly proved. A package of papers fastened together, of which the first and one other are positively sworn to, is produced from the custody of the government. Three witnesses, through whose hands they passed, recognize the package generally, though two of them can positively identify only the wrapper. The broker who got up the case, and gave the papers to the proper officer of the custom-house in New York, swears to

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his letter, which contains a list of the papers, and the papers correspond to the list. He swears to the protest which was taken before him as a notary. The papers were put in evidence at the first hearing, which was some weeks before the close of the case; and it would have been easy to prove fraud or forgery in the documentary evidence, if any such existed. The papers are sufficiently identified.

The principal question of fact is, whether Haines knowingly and fraudulently obtained a register for the brig to which she was not entitled. In construing such a statute, it is right to give the citizen the benefit of any doubtful phrases, and that the offence is not committed unless the vessel was not entitled to the register which she obtained; that is to say, misstatements, though false and wilful, will not forfeit the vessel, if it can be proved as a matter of fact that the vessel, after all, was fully entitled to the benefits which she received. But I agree with the district attorney, that, if fraud and falsehood are proved, it cannot but be very strongly inferred that the truth would not have served the purpose. It is entirely clear that the protest was a tissue of gross fabrications from beginning to end. The man who swore to it as master was not master; the voyage he testified to was antedated about a month, to give time for an imaginary wreck on the shores of the United States; the cargo was not taken out of the brig, as he swears it was; nor was she towed to New York: from all which, it is safe to conclude that she never was wrecked at all. It is further proved that the port-warden's certificate, which purports to describe a wreck and uses that word, is spurious. As the protest is the only evidence which was before the secretary, or has been put into the case, that the vessel was wrecked in the United States, it is hardly necessary to examine the other and less startling falsehoods which are said to be found in the papers.

The question of law is, whether the brig can be forfeited in the hands of innocent purchasers; it being admitted that one-quarter part of the vessel is held by such persons, and argued that the whole is so held. When an act of congress denounces an absolute forfeiture as the consequence of an act, the title of the United States accrues when the prohibited act is done :

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U. S. v. 1960 Bags of Coffee, 8 Cranch, 398; *Henderson's Distilled Spirits*, 14 Wall. 44; and it is equally well-settled, that, when the forfeiture is in the alternative, the property or the value, then the title does not vest in the government until they have elected which they will take; and, in the mean time, an innocent purchaser may acquire a title which cannot be forfeited by a subsequent seizure: *U. S. v. Grundy*, 3 Cranch, 338; *Caldwell v. U. S.*, 8 How. 366.

The claimants insist that the statute governing this case is within the reason of the second class of decisions rather than the first. The words are, "shall be liable to forfeiture;" which they interpret to mean, that the property does not vest until the seizure. It is true of all forfeitures that they must be completed by seizure and the other requisite proceedings, before the title will vest in possession; but, when the seizure is made, it relates back to the time of the forfeiture, excepting when the statute has expressed a different intent. Such a difference was found when the forfeiture was alternative; but there is no alternative in this statute. The vessel is forfeited, if any thing is; and I can see only the contingency that the government may not choose to prosecute, or may not discover the liability; and this is all, I think, which is meant by the phrase in question.

The learned counsel have collated, with much pains, the very numerous provisions of the internal revenue laws, by which penalties are affixed to acts and neglects; and I have examined many of them. The enactments are very various in form. There are many in which it is clear that only the title of the individual wrong-doer is to be taken; as where, upon conviction, certain instruments or articles of the defendant are forfeited, or where the collector may seize distilled spirits which have not been sold by the manufacturer who has broken the law, or which have not passed out of his possession, &c. A large number use words of present forfeiture; a few have the alternative of "the goods or their value;" and a few the expression, "liable to forfeiture." I cannot discover, by an inspection of these last-mentioned sections, that there is any thing in the character of the offence to lead us to expect a different sort of forfeiture from those which are plainly absolute. The reason given in 3 Cranch, that you

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cannot tell which of the two things is the property of the United States until they have made their choice, fails to apply; and I am bound to say, that I cannot find any legal distinction between the various forms of expression by which a forfeiture without an alternative is expressed. *Decree for the United States.*

THE TARQUIN.

DECEMBER, 1874.

Courts of admiralty may admit parol evidence that illiterate seamen signed a contract not read to them, which differed from their oral agreement; and may, in some cases, re-form a written contract by oral testimony.

A usage or practice being proved to put on board only a part of the bait for a fishing voyage to be conducted off the coast of Nova Scotia, the owners relying on catching suitable fish to supply the deficiency, was *held* to be reasonable; and, where the vessel, having failed to catch bait, put into port for a supply, causing a delay of a few days, *held*, that this would not authorize the seamen to refuse further duty.

Where the seamen refused duty before their fishing voyage was ended, and obliged the master to come home with only part of a fare, — *Held*, they had forfeited their wages.

WAGES.—FISHING VOYAGE.—Two seamen libelled the bark Tarquin for wages; alleging that in May, 1874, they engaged for a fishing voyage from Provincetown to the Banquereau Banks, for the round sum of \$150; that the vessel returned to Provincetown, in August, with a cargo of fish, and the libellants were duly discharged, having performed their duty throughout the voyage.

The fourth article of the libel propounded that the voyage was broken up in July, at St. Peters, Nova Scotia, for some cause to the libellants unknown; and that the vessel from that time to the time of the libellants' discharge was engaged in the coasting trade, and had earned freight.

The answer admitted the contract, excepting that it set up an engagement for the season, and not for a single voyage. It then averred that the libellants refused duty at St. Peters; and that the fishing voyage was thereby broken up, to the great damage of the owners; and that the libellants were then and there dis-

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charged, and came home in the vessel at nominal wages. It denied that a coasting voyage was undertaken ; but alleged that some wood was taken on board at or near St. Peters, as ballast, to trim the vessel for her voyage home.

The shipping articles required the defendants to serve for the season ; but the libellants produced evidence, which was not contradicted, that they were unable to read, and that the articles were not read or explained to them, and that their bargain with the master was for one trip only.

There was evidence that, when the contract is for a single trip, it is usually considered to be fully performed when the salt or the bait, or other necessary outfits, are all expended ; that in this case the bait was all used up early in July, when less than half a full fare of fish had been obtained ; and that the vessel having put into St. Peters for bait, the libellants and others of the crew refused duty, alleging that their trip was closed.

The owner of the ship testified that, for three or four years last past, the fishing vessels had not been fully fitted out with bait before sailing, because better bait could be taken on the banks ; that his vessel was fitted as usual for the year 1874, but, for the first time for several years, the bait had failed at the fishing grounds, and that his vessel and many others had been obliged to put into port for a supply. This evidence was not contradicted.

H. M. Knowlton, for the libellants.

F. Dodge, for the claimant.

LOWELL, J. Courts of admiralty, acting upon an equitable practice, though not precisely like courts of equity, may admit oral evidence to prove that illiterate seamen have signed a contract which was not read to them, and which differed from their parol engagement, even without proof that any fraud was intended to be practised upon them. This upon two grounds : that the variation in favor of the ship-owner operates a practical fraud ; and that this court has a right to re-form a written contract, in some cases, by oral testimony.

Taking it to be proved that the seamen agreed for one trip or voyage only, what were the rights of the parties ? I find the evidence to be, that, if the vessel is full, or if every reasonable attempt has been made to fill her, it is to be considered that the trip

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is ended. This is usually measured by the expenditure of the salt or bait or provisions for the voyage. And this is the meaning of the usage testified to. The owners furnish these things; they pay a lump sum for the trip or voyage; and, when the supplies are gone, it is taken for granted that the men have served out their time.

But now comes in the modification that, of late years, all the bait has not been put on board for the trip in such voyages as this, and, when what is put on board has been used, can the men insist on going home? Upon the evidence, I think not. The reliance which the owners placed on catching bait appears, under the circumstances, to be reasonable; and, when it failed, the men were taking a rather sharp point, not conforming to the spirit of the rule, when they insisted that, the bait being out, their time was up. In fact, the usual time had not elapsed; a full fare had not been caught; the men knew very well that the short supply of bait was accidental. To put into St. Peters might extend their trip a few days; and for that it is possible they might have claimed compensation. What they insisted on was that they had made one constructive trip. Courts of admiralty do not encourage constructive performance of a fair contract.

There was no cruelty, hardship, or imposition practised on the men, nor even what in such a voyage can be called a deviation. The owners had failed to supply enough bait, and might perhaps be required to pay for any time which they lost, because it was part of their duty to furnish bait. But they had acted on reasonable and probable grounds; and the action of the men brought the voyage to a losing termination.

Under these circumstances, I think the libellants cannot truly allege that they have performed their contract. And, as it does not appear that the owners have been benefited by their services, they are not entitled to a *quantum meruit*.

Libel dismissed.

Thacher v. Boston Gas-Light Co.

L. THACHER v. BOSTON GAS-LIGHT COMPANY.

DECEMBER, 1874.

An agreement for quick despatch supersedes any custom of discharging vessels by which they are to take their turn at the wharf.

The naming a wharf in the charter-party, containing such a stipulation, amounts to an undertaking that the wharf shall be unincumbered.

Semble, that a charterer has the right to name any suitable and convenient wharf which, when named, stands as if the name had been inserted in the charter-party.

The proviso against liability for detention, unless "by default" of the charterer, exempts him only from delay from causes beyond his control acting directly to retard the discharging.

DEMURRAGE. — QUICK DESPATCH. — The libellant, as master and part-owner of the schooner, Charles E. Gibson, chartered her to the respondents, to bring a cargo of coal from the Albion Mine, at Pictou, Nova Scotia, to Boston. The charter-party contained the following stipulations: "It is agreed that the lay days for loading and discharging shall be as follows (if not sooner despatched), commencing from the time the vessel is ready to receive or discharge cargo. *Vessel to take her turn in loading, as customary, at Albion Coal Company, and quick despatch discharging*; and that, for each and every day's detention by default of said party of the second part or agent, *fifty* dollars per day, day by day, shall be paid by said party of the second part or agent, to the said party of the first part or agent." The words in italics were written; the others were in the printed form of the charter-party.

The schooner arrived at the respondent's wharf, in Boston, with a full cargo of six hundred and eighty-four tons of coal, on Sunday, Aug. 2, 1874, and was ready to discharge on the next day. No berth was ready, and the discharge of the cargo was not begun until the 13th of August, and it was finished on the 19th.

The answer alleged, and there was evidence tending to show, that the respondents had suitable accommodations for receiving the different kinds of coal at their wharf, which were sufficient for ordinary occasions; that they always endeavored to charter vessels at such times that they would not interfere with each

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other, and had done so at this time, but other vessels happened to arrive just before the libellant's schooner. It appeared that there was room for the schooner somewhat sooner at another part of the wharf, but that it would have been inconvenient to the company to take this sort of coal there; that the libellant had brought a cargo to that wharf a short time before this charter-party was made; and that the schooner was very long in proportion to her carrying capacity, which caused a part of the delay.

The suit was for nine days' detention, at the agreed rate.

J. C. Dodge, for the libellant, cited *Davis v. Wallace*, *ubi infra*.

C. P. Greenough, for the respondents.

LOWELL, J. The case of *Davis v. Wallace*, decided by Clifford, J., in the circuit court for this district, in 1868, holds that an agreement for quick despatch overrides any customary mode of discharging vessels, by which they are to take their turn at the wharf. A similar decision has, since that time, been made in the southern district of New York: *Keen v. Audenried*, 5 Bened. 585. The only distinction taken at the argument between the former case and this is, that the charter-party in *Davis v. Wallace* did not designate the wharf for discharging; while here, the wharf being named, the usages of its owners may be presumed to be known, and to have been impliedly provided for. This difference will not support a distinction in the judgment on this point; because a charterer has an undoubted right to name any suitable and convenient wharf, and, when it is named, the contract stands as if the name had been inserted in the charter-party: *Tapscott v. Balfour*, L. R. 8 C. P. 46. The learned judge in *Davis v. Wallace*, recognizing this right, held that an unincumbered wharf ought to be named; but the meaning was that the naming a wharf was a warranty that a berth could be had there. So here, the contract amounts to an undertaking that the respondents' wharf shall be unobstructed.

This construction is somewhat aided, as was argued for the libellant, by the written words and their collocation; by which, after providing for the schooner taking her turn at Pictou, the expression is immediately varied, and quick despatch is agreed upon for Boston.

The remaining question is, whether the proviso, that demurrage is to be paid only if the detention is "by default" of the respondents, relieves them from responsibility. This proviso is usual in Boston charter-parties, and perhaps not in others. It has been construed in three cases which have come to my notice. In *Towle v. Kettell*, 5 Cush. 18, it was held that a detention at quarantine, by order of a foreign government, was not by default of the charterer. In *The Cargo of the Mary E. Taber*, 1 Bened. 105, it was proved, that, by the custom of the port of discharge, the charterer had a right to order the deck load to be delivered at one pier, and the remainder of the cargo at another; and time was lost in taking the vessel to the second pier, and the detention was alleged by the master to have been occasioned by bad weather. It was held that this delay was not by default of the charterer. The third case is *Davis v. Wallace*, above cited, where Clifford, J., said that the stipulation for quick despatch excluded all delay save the time employed in discharging, except what was occasioned by natural causes beyond the control of the party so contracting.

These three decisions are not inconsistent with each other; and they mean that the proviso intends to exonerate the charterer from delay occasioned by superior force acting directly upon the discharge of that cargo, and not from the indirect action of such force, which by its operation on other vessels has caused a crowded state of the docks. If the respondents do not furnish the wharf room, or any other means and appliances which they are to supply, it is not enough for them to prove that they have taken reasonable measures to procure them. In short, the default does not mean negligence, but a failure of contract on their part, unless it is caused by a direct and immediate *vis major*, or something like it.

Upon this point, as upon the other, I find it impossible to distinguish the case from *Davis v. Wallace*. As the court there said that the respondents were bound to choose a wharf where the discharge could be at once proceeded with; so here I must say that these respondents were bound to discharge the vessel at the other part of their wharf, or at some other convenient wharf. The question in both cases is one

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of convenience, and the contract decides that question. I have held in one case, that a master who by his bill of lading was consigned to one wharf, which happened to be full, could not recover demurrage for time lost after he had been offered another suitable and convenient wharf, a ruling which fits this case exactly to *Davis v. Wallace*.

The measure of damages is the difference between the time the vessel was detained and quick despatch. There was very little evidence on this point; but what there was agrees with the well-known usage, which has been so often proved in this court, that coal is to be discharged at the rate of one hundred tons a day, Sundays excepted. This would give the nine days' demurrage asked for by the libellant. I have doubted whether I ought not to throw out one day, according to the same usage. But as that applies to all voyages to the port, and the first day is given to enable the consignee to find a wharf and the master to reach it, I have concluded, upon the whole, that this part of the usage does not fairly apply to a case in which the wharf is reached before the notice is given.

Decree for the libellant for \$450 and costs.

HINMAN v. CUTLER.

DECEMBER, 1874.

In this district, if there is a stay of proceedings against one of several joint defendants, pending action upon his discharge in bankruptcy, the case cannot proceed against his co-defendants, unless the plaintiff chooses to enter a *nolle prosequi* as to him.

A qualified judgment cannot be entered against one of several joint defendants, which leaves the liability of his co-defendants undetermined.

THE plaintiff, as assignee of a bankrupt, brought an action in the district court of the United States, against Cutler and others, composing the firm of Cutler, McLean, & Co., to recover certain sums of money alleged to have been paid to that firm by the bankrupt as a preference. A verdict was rendered for the plaintiff at a former term of this court, and the defendants filed exceptions

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to the rulings of the judge who had presided at the trial, which were allowed ; but, before judgment had been entered on the verdict, the defendants became insolvent, and all but one of them took proceedings in bankruptcy, and were adjudged bankrupt, about six months since.

The plaintiff now moved for judgment against the defendant not in bankruptcy, but did not ask to discontinue against the others.

C. Allen & W. A. Field, for the plaintiff, cited *Hoyt v. Freel*, 8 Abb. Pr. N. s. 220.

T. P. Proctor, for the defendants, cited *Tinkum v. O'Neale*, 5 Nev. 93.

LOWELL, J. Section 21 of the statute which provides for a stay of proceedings in suits against a bankrupt, until he shall have an opportunity to obtain and plead his discharge, is silent concerning actions in which the bankrupt is only one of the defendants ; and it may be that, in different districts, the rule may vary in such cases, because the practice of the State courts now governs our practice, and that may not be uniform. But, in Massachusetts, I apprehend there is no authority for holding that, if one joint defendant is entitled to a continuance, the case may proceed against the others. At common law, such action is inadmissible ; and no statute has been cited to support it. The same rule which requires partners to be joined, authorizes any one of them to object to a judgment being obtained while the liability of his co-defendants remains undetermined. One of the questions in this case will be, whether the defendants are jointly liable ; and that question cannot yet be answered, because a defence is lawfully interposed, the validity of which will depend on facts yet to be ascertained.

No question is raised concerning any right of the plaintiff to discontinue against part of the defendants, and take judgment against the others. He is not willing to do this ; and my judgment is asked upon the right to proceed against one of the defendants ; reserving further action hereafter in the same suit against such of the others, if any, as shall fail to obtain a discharge in bankruptcy. It is insisted that some sort of qualified judgment may be rendered, which will do no injury to the bankrupts,

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and yet enable the plaintiff to pursue his remedy against the remaining defendant. For this position, *Hoyt v. Freel*, 8 Abb. Pr. N. s. 220, is cited. The learned judge in that case, reasoning from sound premises, has reached a conclusion that seems to me unsound. It is true that, by the very terms of the statute, no partner or joint contractor is to be discharged by the discharge in bankruptcy of the person or persons liable with him; and this is one of the leading rules of all bankrupt laws. But it does not follow that no action shall be delayed until it can be determined whether the bankrupt defendant is to remain one of the joint debtors or not. If a necessary party to a suit has not been fully served with process, or is entitled to delay for any other reason, the whole suit must await the completion of the service or other proper action. Apart from technical considerations, it is a matter of substantial interest to a defendant to have his right of contribution from his co-defendants ascertained by the same judgment that establishes his own liability. It seems to me, therefore, that the case cited by the defendants, *Tinkum v. O'Neale*, 5 Nev. 93, is well decided.

A qualified judgment may be rendered against a bankrupt where it is necessary, in order to enable the plaintiff to realize an attachment which is not dissolved by the bankruptcy, or to ascertain the amount of a debt that is in dispute; but, as I have had occasion to say before, the judgment in such cases ought to show on its face the purpose for which it is rendered. There is no hint in the statute that a judgment may be entered for the purpose of giving, against co-defendants with the bankrupt, some remedy which the usual course of justice would not give.

I ought to say that, upon the face of the record when the motion was made, there would appear to be an amount in dispute, namely, the whole amount of the verdict; for the defendants contended that the rulings were contrary to law. But as they have undertaken to stipulate that the verdict shall be accepted as conclusive evidence of the amount, and that proof may be made against the assets for that sum, the judgment cannot be entered in order to settle that question.

The motion was not pressed on the ground that the debt was one contracted by fraud, and so not dischargeable in bank-

Re Dugau.

ruptcy. The learned counsel for the plaintiff very frankly said that this question would arise more properly after the discharge was granted, if it should be granted.

Motion for judgment denied.

In Re J. DUGAU.

DECEMBER, 1874.

Where there is an application for extradition, sustained by complaint on oath, it is not for the judge to consider whether or not a foreign government has authorized the application: he has only to examine the evidence of criminality; and, if he deems it sufficient to sustain the charge, to certify the same to the secretary of state.

The treaty of extradition with Great Britain does not give the accused the right to be confronted with the witnesses against him: the evidence may be in the form authorized in the country whence it comes, and, in substance, sufficient to warrant action in the country whose action is invoked.

The testimony of the accused is not admissible in a case of extradition, tried by a judge of the United States, though he is sitting in a State where such evidence would be received.

LOWELL, J. The judge has nothing to do with the question whether the government of the foreign country has duly authorized an application for the extradition to be made. The law is, that, when complaint is made on oath, the judge is to examine the evidence of criminality; and, if he deems it sufficient to sustain the charge, shall certify the same to the secretary of state, that a warrant may issue upon the requisition of the proper authorities of the foreign governments. The requisition is to be made to the executive department, and, in the natural order of things, would be made after the evidence is taken and certified. If the authorities of the foreign government should find, on the examination of the evidence, that it does not make out a case which they choose to press, they will make no requisition. And the statute gives them two months in which to complete their action upon the matter.

A complaint was duly made to me, on oath, against the prisoner; charging him with having committed the crime of murder on one Charles Robinson, at Clare, in Nova Scotia, in October

Re Dugau.

last. At the hearing, depositions taken before the coroner in the county where the offence is said to have been committed were given in evidence, with a certificate by the vice-consul of the United States at Halifax that they are duly and legally authenticated, so as to entitle them to be received in evidence to support the charge of murder, and for similar purposes, by the tribunals of Great Britain and its dependencies.

It is objected that the prisoner has the right to be confronted with the witnesses against him. I understand this objection to be founded in part upon the language of the treaty, which says that the offender shall be delivered up, only "upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offence had there been committed." This refers to what may be called the degree of proof, and not to the mode and form in which it shall be given. The statutes of 1848 and 1860 take this view of the matter, and require us to admit depositions and other papers, or copies thereof, duly authenticated, if they would be received for similar purposes in the tribunals of the country where the crime was committed. This is a reasonable and almost necessary arrangement. The evidence may be in form what the law of the country from which it comes authorizes, and in substance enough to warrant action in the country whose action is invoked. If this were not so, still a law of congress, constitutionally valid, must govern the courts of the United States, whether it conforms to the treaty or not.

The objection rests in part upon the language of the act of 1860, 12 Stats. 84, which authorizes the use of depositions and other papers, if they could be received for similar purposes by the tribunals of the foreign country from which the accused shall have escaped. It was argued that, by the English law, depositions taken *ex parte* could not be received on a trial for murder. I have not undertaken to examine the English law on this subject, with care; but my impression is, that there are many authorities which hold that such depositions, taken before the coroner at an inquest, are admissible on the trial, though those taken before a justice are not. But I know that some of the best wri-

Re Dugan.

ters on the subject condemn the practice, and I do not rest my decision upon it. The statute does not refer to evidence admissible at the final trial of the cause, but to such as would be received on a preliminary examination ; and the consul has certified that these papers are so admissible, and I know of no reason to doubt it.

It is further objected that the certificate of the consul is too general ; not designating the papers, excepting that they are annexed, which leaves open the question whether all these papers were annexed when the certificate was attached. The depositions purport to be the original evidence given before the coroner and his jury, and taken down by him ; and, besides the general certificate of the consul, he gives another, that C. H. Oakes was and is a coroner, and that the annexed verdict and depositions are the originals, &c. On examination of the two certificates and the annexed papers, I think they are sufficiently authenticated. It is a question chiefly of fact, in each case, whether the authentication is regular ; but I may observe that it was held in *Farez' Case*, 7 Blatch. 345, not to be essential that each deposition should be separately certified, if the court could ascertain with reasonable certainty what papers were referred to in the certificate.

The defendant's counsel intimated that he might desire to examine his client as a witness, if his evidence were admissible. In *Farez' Case*, 7 Blatch. 345, the learned judge held that a prisoner whose extradition was demanded under the convention with Switzerland might be examined in his own behalf, because that convention referred the courts to the laws of the country where the examination was had for their guide in conducting it, and by this reference it incorporated the criminal law of the State of New York into its mode of proceeding. No doubt the prisoner is entitled to be heard, and to produce such evidence as would be admissible here ; but the admissibility of the evidence must be governed, as it seems to me, not by the laws of the State where the magistrate happens to sit, unless he is a magistrate of the State, but by those which govern his conduct in all other criminal cases. As my powers are derived from the United States, and my action is governed by acts of congress, so far

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as they apply, I do not feel at liberty to adopt any other rule than that which governs the courts and magistrates of the United States. I should be glad to receive this evidence, which one branch of congress has, twice at least, expressed itself in favor of admitting, but cannot find it in my power to admit it. I do not understand, however, that I am shutting out evidence of any special importance in this case. I do not wish it to be understood that I should not likewise feel bound to admit for the defendant any evidence, whether certified by the consul or not, if it were sufficiently authenticated, which, by the laws of the place where the evidence against him was taken, would be admitted for similar purposes.

It only remains to say that I deem the evidence of the defendant's criminality to be sufficient to require me to certify the same to the secretary of state. I decided in *Kelley's Case*¹ that the crime of manslaughter is not within the treaty, and there is some slight evidence tending to show that this may turn out to be such a case; but I think that the whole evidence taken together is clearly such as would require, in a domestic case, that the prisoner should be committed on the higher charge. Indeed, I do not understand that any serious question is made on this point by the learned counsel for the defence.

Certificate accordingly.

W. A. Hayes, Jr., assistant district attorney, for the complainant.
C. J. Brooks, for the defendant.

THE MARY STEELE.

DECEMBER, 1874.

In assessing damages for a collision, a fishing-boat, making weekly trips or voyages for the market, which has lost a trip as the necessary result of the injury, may be allowed the probable profits of the trip.

These may be allowed when the only actual injury was to a seine, which could neither be repaired nor replaced in less time than a trip would require, and which was of so great value, that to assess it as a total loss would exceed the damage incurred by the loss of the trip.

¹ *Ante*, p. 389.

The *Mary Steele*.

COLLISION. — DAMAGES. — Libel by the owners and crew of the schooner *Hattie N. Reed*, of Swampscott, and by the owners of a large and valuable seine used in connection with said schooner in the mackerel fishery, against the schooner *Mary Steele*, of Wellfleet. The allegations were, that all the libellants were associated together in the fishing business upon the coast of New England, dividing the catch in certain definite proportions; that the crew were engaged on the thirtieth day of July, 1874, at noon, in casting the seine about a school of mackerel, at a point near Boothbay, on the coast of Maine; that many vessels were in the neighborhood, and among them the *Mary Steele*; that the latter vessel came down before the wind near to the seine, and suddenly changed her course and shot directly into the seine, and damaged it, rendering it useless, so that the libellants were obliged to carry it to Boston to be repaired, whereby they lost their trip and were detained one week, and suffered damage to the amount of \$1,000, besides the cost of repairing the seine. The answer, admitting the collision, alleged that it happened without fault of the *Mary Steele*.

C. P. Greenough, for the libellants.

F. Dodge, for the respondents.

LOWELL, J. The responsibility for the collision is upon the *Mary Steele*. She began by trying for the same school of fish; but seeing that the other schooner had the first right, her boats lay near by, hoping to catch the fish if they should escape the libellants. All of the crew, excepting the ship-keeper and a boy, were thus engaged in the boats, and the schooner was keeping near her boats, for convenience. Of course, it was for the schooner, while under way, to keep clear of the boats that were casting a seine, and the only excuse given for a failure to comply is, that the vessel missed stays. But if she was on such a course as to need to go about in order to avoid the seine, she is bound to take the risk of missing stays, as there was nothing in the wind or sea that can account for the misfortune, and make it, in law, an inevitable one.

The most serious question in the case is that of damages. These seines, it seems, are large and valuable, costing nearly as much, perhaps, as some fishing schooners. In this case the ship

• The Mary Steele.

drew one-fourth, and the seine one-sixth, of the catch. The libellants' counsel has cited many of the latest cases to the point, that where the voyage or business of a vessel is broken up, the probable profits may be given as damages for detention, if the character of the trade is such that an ordinary allowance in the nature of freight would not meet the justice of the case: *The Cayuga*, 2 Bened. 125; 7 Blatch. 385; 14 Wall. 270; *The Favorita*, 4 Bened. 132; 8 Blatch. 539; 18 Wall. 598, and other cases, where the loss of the probable earnings of a ferry-boat, and other damages of like nature, have been allowed.

The objection taken to this allowance resolves itself into two: 1, whether any damages should be assessed for the loss of the use of the seine; and, 2, whether they should be assessed in the mode asked for by the libellants. It is proved that the Hattie N. Reed was a market-boat, accustomed to make trips which averaged about a week in length, bringing to Boston fresh fish for immediate sale, netting from \$700 to \$1,000 for a trip. She was fitted with ice and various other appliances, and, among others, with this seine, and with hooks and lines. At this time the fish would not bite freely, and must be caught in the net, or not at all. Without the seine the trip was certain to fail, and when it was damaged, the master thought best to carry it to Boston to be repaired.

There was some conflict in the evidence as to whether the seine could have been mended at Boothbay: upon the whole evidence, I think the preponderance is that the work could not be done there to any better advantage, in point of time, than at Boston.

Under these circumstances, is the Mary Steele bound to pay for a broken voyage, or only for the immediate injury to the seine? It seems a hardship that a damage of \$45 to a net should involve some hundreds of dollars by way of loss of the use of the net. Supposing a boat had been stove, would that carry like consequences, on the ground that the seine could not be set without a boat? And suppose a thole-pin in the boat were broken, is the voyage to be paid for?

The answer is, that the injury or destruction of any thing which cannot be replaced, and which entails the loss of the voyage, however insignificant the thing itself may be, will often carry with it damages for the loss which is its necessary conse-

quence. A comparatively small injury might sometimes oblige a considerable deviation and delay, such, for example, as the loss of all the nautical instruments. The damages would not be the mere value of these instruments on shore, if the consequence is a further loss occasioned by the necessity of supplying them.

It is true that in collision cases loss of profit on the cargo is not allowed; but this is an old rule, which Mr. Sedgwick considers out of harmony with recent decisions: Sedgwick, *Damages* (4th ed.) 541, note 1. The loss of profits of a voyage is assessed in the form of freight and demurrage, and the mode of estimating cargo, while it does not give profits, gives interest instead. The general rule now is, that, in actions like trespass, profits may be assessed if they were reasonably certain to have accrued, and that they have been destroyed by the trespass; and in the case of a voyage broken up we have this certainty, because the enterprise is in such a state of forwardness that its results may be foreseen.

In salvage cases, which are neither contract nor tort, the probable profits of a fishing voyage which has been lost are sometimes allowed, if the voyage had already been entered on. It is said that if the loss of the voyage will be very great, and the danger is not of the most pressing kind, the master of the fishing-vessel ought to warn the master of the vessel in distress of the great expense he is incurring. But this is a consideration which cannot apply in collision. See *The Salacia*, 2 Hagg. 262; *The Louisa*, 3 W. Rob. 99; *The Hedwig*, 1 Spinks, 84, and note a; *The Norden*, id. 185.

If a contract had been made to furnish this seine off the coast of Maine, the contractor being informed that the vessel and men would be waiting to receive it, the damages for not delivering would be the probable profits that were lost by the failure to deliver, because this loss must have been foreseen by the parties. Taken either as being a consequence sufficiently direct to be within the expectation of any one dealing in the subject-matter, or as being, in this particular case, unavoidable, I think profits may be recovered for loss of the use of the seine.

Then as to the time. If the seine were an instrument of small value, damages could not be allowed for waiting to have it

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repaired, when it might have been replaced at less cost than that of the demurrage. But that, I understand, is not the case. Its value was more than the damages sued for.

As to the mode of ascertaining the value of the time lost, there seems to be no other that can be applied than the probable profits. The schooner had a much larger number of men than merchant vessels carry, and different outfits. There is no customary rate of hire or market price for such vessels, and cannot be, from the mode in which the business is conducted. The precedent of the ferry-boat seems to be a strong one, because the reasons are the same.

It was stated by the libellants' witnesses that their trip was not a total failure, for they had caught thirty barrels of mackerel that morning, which they sold in Boston for about \$300. In estimating the lost trip less the salvage, I think I ought to take a rather low average, and I accordingly assume that a trip would be worth \$800; and, deducting the \$300, we have \$500 as the damages, besides the cost of repairs, which is \$45, making \$545 and costs.

Decree accordingly.

Re COTÉ.

DECEMBER, 1874.

The word *tradesman*, in sect. 29 of the bankrupt law (Rev. Stats. § 5110), cannot fairly be held to mean *trader*, in the large sense of the old bankrupt law. Its meaning considered.

A farmer, who occasionally bought and sold horses, cattle, and hay, was held not bound to keep books as a tradesman, within that section.

BANKRUPT. — DISCHARGE. — TRADESMAN. — The bankrupt's discharge was opposed on the ground, that, being a tradesman, he had not kept proper books of account. The evidence tended to show that he was a farmer, and conducted his farm chiefly through his hired men; that several times in each year he visited Canada, and he then usually bought horses or cattle, and sometimes hay, partly for use on his farm and partly for sale. His dealings in these articles were for cash. He was unable to write,

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and had never kept any books. There was no evidence that his failure was connected with his buying and selling. The amount of his dealings was a subject of some conflict of proof.

G. W. Morse, for the objecting creditors.

N. B. Bryant, for the bankrupt.

LOWELL, J. I have more than once referred to the difficulty which I find in understanding what persons congress intended to include in the class of tradesmen. That this is not a fanciful objection may be seen by the remarks of the court in construing a statute of Pennsylvania, which exempted the necessary tools of a "tradesman" from seizure on execution, in *Ritchie v. McCauley*, 4 Penn. St. (Barr) 472. "It is to be regretted," says Bell, J., in delivering the opinion in that case, "that, in framing a statutory provision of so much importance, a term so vague, and admitting of such variety of signification, should have been employed." He then goes on to say that in England the word is applied to small shopkeepers, but that in the United States it is rarely applied to persons engaged in buying and selling, but to mechanics and artificers of every kind, whose livelihood depends upon the labor of their hands. Burrill, in his Law Dictionary, adopts this meaning, and gives this case as the authority. Bell, J., cites, too, the opinion in a case in Massachusetts, where the word is used in the same sense: *Howard v. Williams*, 2 Pick. 80, 83. In Webster's Dictionary the definitions are: 1. One who trades; a shopkeeper. 2. Any mechanic or artificer whose livelihood depends upon the labor of his hands (citing Burrill). 3. A handicraftsman in a borough (citing Scot.). In Wharton's Law Lexicon (English), the definition is "a shopkeeper."

The act of congress is taken in this part from the insolvent law of Massachusetts: Gen. Sts. ch. 118, § 87; but I have not seen any reported case in which it is construed by the courts of the State. We may well regret that the bankrupt act of 1841 had not been followed, which imposed this duty on every merchant, banker, factor, broker, underwriter, or marine insurer. Persons coming within that description might be expected to keep books; but it will be difficult to find any modern definition or use of either "merchant" or "tradesman," which will include underwriters; so that the description probably omits

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some classes of persons who might well enough be included. Our present inquiry, however, is, whether it describes a person whom no one would expect to find subjected to such a duty, as, for instance, a handicraftsman.

It cannot be believed that congress really expected that a farmer, who sometimes incidentally, whether more or less often, bought and sold farm stock in addition to his own, and who would not be fitted by education to keep books, and who could not afford to have a clerk, should become an accountant. And yet if "tradesman" means "trader" in the largest sense, and if occasional trading makes a trader, no doubt this defendant was a tradesman.

I am of opinion that "tradesman" cannot fairly be stretched to mean "trader," in the large sense of the old bankrupt law. That law was, for some time, confined to persons who used the trade of merchandise, or sought their living by buying and selling. Among its earliest maxims was one, still important and binding in many respects, that it was to be taken largely and remedially for the benefit of creditors; and accordingly the class of persons subject to the law was continually extended by successive statutes and by decisions. Under these conditions, it was determined that any person might be brought within the act as a trader who bought and sold for gain, though his dealings might be on a very small scale compared with his means invested in other ways, or might be remote from his usual occupations. He would be a trader if he owned one share in a bank or trading company not incorporated. There is no such reason for giving a large meaning to the word "tradesman" in sect. 29 of the act of congress, and I do not think the word is ordinarily so used at present.

Nor am I prepared to admit that the word has a very different meaning in England and the United States. In both countries it is, I think, most often used as synonymous with "shopkeeper," and not seldom as a person who supplies your daily or occasional wants, such as a butcher or baker, or even a plumber or carpenter, whether he keeps a shop or not. But in both countries it has a signification much more restricted than that given to "trader" in the old bankrupt law; and I doubt if a dealer in

horses and cattle has often been called a "tradesman" in either country.

The English statutes, for some forty or fifty years past, have put at rest the nice and perplexing questions about traders, by giving an alphabetical list of the occupations which should constitute trading, for the general purposes of those acts. But there is nowhere any such definition of "tradesman;" and the word has not become a technical one, excepting in some State statutes, such as have been already referred to, which are not *in pari materia* with the bankrupt law, and in which it is certain that the meaning is different from that intended here. The question, therefore, is addressed to the common usage of this country, and to the judge's knowledge of his own language.

The word might, in many connections, be used in the sense of any man who trades; but I doubt if that is at the present time its usual signification, and whether it has that meaning in this section. The subject-matter proves that the act does not apply to handicraftsmen, or at least that there are many such to whom it cannot apply. The meaning of "tradesman" is, I think, substantially the same as "shopkeeper." "Merchant," in this connection, contrasts with "tradesman," as the greater with the less, and not *vice versa*.

The trading of this defendant is small enough in amount to bring him down below the grade of a merchant; and there remains a further question, whether congress intended that an occasional dealing by a farmer in farm products, other than those he has raised on his land, will make him a tradesman within this section, even if a person whose sole business should be to trade in such products, like what we call a grocer, or provision dealer, or cattle salesman would be. Here a distinction fairly arises out of the intent of this part of the statute, opposite to that which caused such an extension of the class of traders as general subjects of the bankrupt laws. It does not seem to me that congress intended to say that every one who ever bought and sold, under whatever circumstances, must keep books of that part of his business; but that real merchants and actual tradesmen, being the class of persons whom the common practice of mankind makes bookkeepers, should keep their books properly; and that

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there may be persons who trade, such as peddlers, in a small way, but more especially persons like this defendant, who buy and sell merely by way of eking out their living, which is principally earned in other ways, that are not to be required to do this. Such a construction may leave the law a little uncertain; but it is, in my judgment, a sound construction, and the only one that will effect justice in the long run. In short, the distinction I take between this part of the law and that which made traders an extensive class, is, that the latter was remedial between debtors and creditors, and to be extended; and this imposes a duty on a certain class of persons, as such, and ought to be confined to those who actually belong to that class with some degree of permanence.

Discharge granted.

268 LOGS OF CEDAR.

DECEMBER, 1874.

If part of a cargo is discharged at one wharf and part at another, the owners of the vessel not objecting, the time necessary for moving the vessel is not chargeable to the charterers.

A formal notice to the consignees that a vessel is ready to receive cargo is not necessary if they knew that she was ready.

That they did know it may be inferred from circumstances, so far as to throw the burden of proof on them to show the contrary.

LIBEL for freight and demurrage under a charter-party, by which the brig John Airles was let to hire to J. Van Praag & Co., of Boston, for a voyage to Surinam and back to Boston. At the trial it was admitted that the balance due for freight was \$922.85, and the dispute was, whether any and what sum was due for demurrage. The master had died on the homeward voyage, and the mate testified to a considerable delay at Surinam beyond the time allowed by the charter-party, but could not explain its causes beyond what was taken up in repairing the ship, which, being deducted, left more than a week to be accounted for. There was conflicting evidence concerning the conduct of the parties on the arrival of the vessel at Boston.

The contract provided for twenty-five running days, for discharging and loading again at Surinam, and despatch in unloading at Boston, "commencing from the time the captain reports himself ready to receive or discharge cargo."

J. C. Dodge, for the libellants.

S. J. Thomas, for the claimants.

LOWELL, J. The evidence proves that part of the homeward cargo was discharged at one wharf and part at another; and no objection appears to have been made by the owners of the brig to this mode of unloading, and I assume it to have been proper and according to the usages of the trade. The time needed for moving the brig would not be chargeable to the charterers under these circumstances: *The Cargo of The Mary E. Taber*, 1 Bened. 105. But it is proved that the charterers neglected for two or three days after the first part of the cargo was taken out to name the place at which the remainder was to be delivered; and for this time they must pay.

The more difficult question of fact is, whether they are responsible for ten days at Surinam, or only for two days. Twenty-seven days were actually taken in unloading and loading at that port, so that two days are clearly due; but whether the remaining eight are so is the difficult point. Those days were lost after the vessel was repaired and ready, and before the first log of cedar was brought alongside; and the point is, whether the master notified his readiness to load. This is a simple question of a presumption of fact; but I have found it none the less a difficult one, the master being dead, and the mate having no knowledge upon this matter.

I do not understand that any formal notice need be given, if the brig was ready, and the consignees knew it. The master's notice would not bring on the lay days if the ship was not ready, and his failure to notify in form would not put them off, if the other party was fully informed of the ship's being ready. The notice is provided for mainly to exclude the notion that the mere arrival of the vessel in port shall cause the lay days to begin to run.

Now, it is proved that, after the repairs were made, the brig was hauled into the stream within sight of the consignee's place

of business, which was not more than two hundred and fifty yards away. It is further proved that after the loading was actually begun there was delay, and an evident deficiency in the men and means employed by the charterers. From the former circumstance, and from the constant intercourse that always takes place between the master and his consignees in a foreign port, especially when the vessel has just been discharged by the same consignees, and that the consignees advanced more money than the charter called for, which must undoubtedly have been to pay for the repairs, and from the fact that it was the manifest duty and interest of the master to give the notice, if necessary, I think common sense requires me to infer that the information was given to the charterers, or acquired by them in some mode. The probability that the delay may have been caused by some want of preparation on the consignees' part is strengthened by the fact that there was afterwards actual and undoubted delay and difficulty from that cause. And although the plaintiff can never succeed upon the mere weakness of the defendant's case, yet, if the burden of proof is once sustained, it is to be observed that the answer accounts for the delay only by the repairing of the ship, which does not fully account for it; and that no evidence has been given in on the claimants' part, though the case was delayed a long time, in order to take depositions at Surinam; and that there was no suggestion in any of the conversations or correspondence, so far as appears, that the consignees had failed to receive notice that the brig was ready to receive cargo after her repairs were completed.

The original charter-party stipulates that the demurrage shall be at the rate of thirty *silver* dollars a day. The notarial copies furnished the parties both vary from this: one says, thirty *Spanish milled* dollars, and the other thirty *dollars*, "Spanish milled" being erased. Of course the original must govern the assessment, and the premium for silver must be added.

Decree accordingly.

Scott v. Rose.

W. SCOTT v. H. ROSE.

DECEMBER, 1874.

The act of 20th July, 1790, § 5, 1 Stats. 188, so far as relates to absence without leave, and an entry thereof in the log-book, was repealed by the statute of 7th June, 1872, §§ 51, &c., 17 Stats. 278; and, if that statute is repealed, as to coasting voyages, by Stat. 1874, ch. 260, 18 Stats. 64, the repeal does not affect rights accrued before the repeal.

The forfeiture of wages for absence without leave is left largely to the discretion of the court; and, where such absence was not fully justified, but had caused no pecuniary loss to the master, a small deduction from the wages was made.

LOWELL, J. This little case involves some nice points of law and fact. The libellant proceeds for wages said to have been earned in 1873. It appears that the libellant lives in Baltimore, and that he was employed as cook on board the brig Chimborazo, of which the defendant is one of the owners, in a considerable number of coasting voyages from Massachusetts and Maine to Baltimore and other Southern ports. Twice it happened that he stayed away from the ship in Baltimore, under circumstances which the respondent contends were such as to forfeit the wages due him. On the first occasion the master had hired the vessel by a parol charter, which, by the common law as administered in Massachusetts and Maine, would render the charterer alone responsible for the wages of that voyage. I agree with the opinion of Judge Ware, that the general owner, who has received his share of the freight, is liable in admiralty for the wages, notwithstanding such a charter. I do not now enlarge upon that topic, because my decision in this case does not turn upon that question.

In the conflict of evidence, I think one thing is tolerably certain, that the libellant is entitled to thirteen dollars as wages, which the owners were to pay, because they had been earned while the vessel was lying in Boston, before the master had taken her on shares. This was the written statement of the master at the time, given to the libellant, now produced in court, and admitted to be genuine. The master, as between himself and the owners, was the only person who suffered any loss by the absence of the libellant from the vessel, because he was to furnish a cook as well as all other seamen; and, therefore, taking the defence precisely as

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it is put, the absence cannot affect the right to wages earned under another contract with different parties, and accrued before the master chartered the vessel. I cannot see my way to decree more than this sum in respect to this voyage, and that sum is due on any possible construction of the law.

The second voyage was under a different master, who has testified upon the stand. The voyage was from Belfast, in Maine, to Baltimore, and back to a northern port of discharge, for which articles were signed. The master says that the libellant, being given leave of absence on Saturday, to extend through Sunday, did not return until Wednesday; that on Monday night the master entered the libellant as a deserter in the log-book, and on Wednesday morning hired another cook. When the libellant returned, he said his wife had been ill, and there was some discussion about that, but the master refused to take him back. The articles and log-book were lost in the brig on her return trip. There was remaining due to the libellant at this time, according to the master's computation, about thirty-four dollars. The contention of the defendant is that the wages were wholly forfeited by a statutory desertion.

I am of opinion that the act of 1790, sect. 5, 1 Stats. 133, so far as relates to absence without leave and an entry thereof in the log-book, was repealed by the statute of 7th June, 1872, sects. 51, &c., 17 Stats. 273. These sections have always been construed to apply to all voyages, and not merely to those mentioned in sect. 12 of the act; and it is clear that they are of a general nature, and there is nothing to confine or limit their application, excepting that sect. 52 requires an entry of absences to be made in the "official log-book," and sect. 58 only requires such log-books to be kept in foreign voyages, or those between the Atlantic and Pacific coasts. But this mere incidental discrepancy cannot vary the construction of this part of the law. It may, perhaps, excuse the officers from making the entries in the ordinary log-books; but this is the extent of its effect, if it has any.

It is said that by the statute 1874, ch. 260, 18 Stats. p. 64, coasting voyages are taken entirely out from all the provisions of the statute of 1872; and this seems to be so. But that statute cannot retroactively affect the civil rights of these parties, which

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were fixed before the repealing act was passed, though it might cut off any criminal penalties, which could be enforced only by virtue of that act.

I conclude, then, that there was no forfeiture of the whole wages under the statute of 1790, but that the case must be decided by sect. 51 of the act of 1872, which leaves the forfeiture very largely to the discretion of the court. If the libellant's wife was so ill that he could not properly leave her, he should have sent word to the master. He says he hired some one to go and inform the master; but this seems to be doubtful. Still the absence was not very serious, and was not in any sense a desertion by the maritime law, and there is no evidence that the master suffered any pecuniary loss, though he must have been put to some inconvenience. His new cook appears to have been hired at five dollars a month less than the wages of the libellant.

Upon the whole, I think a deduction of ten dollars a sufficient penalty for this absence.

This leaves due the libellant, on the first voyage, \$13; on the second, \$23; total, \$36.

Decree for \$36 and costs.

C. G. Thomas, for the libellant.

F. Dodge, for the respondent.

J. ANTONE v. A. HICKS.

DECEMBER, 1874.

A seaman in the whaling service, who, having become separated from his ship by no fault of his own, fails to rejoin her from causes which he cannot control, is entitled to wages to the time of separation, and the expenses of return to his country, as if the ship had left him behind for sickness.

Where the master sold the effects of such a seaman by auction, and there was no evidence of negligence or bad faith on his part, the owner of the ship was held liable only for the amount realized by the sale.

WAGES. — WHALING SERVICE. — The libellant was shipped at New Bedford in July, 1869, on board the defendant's ship *Mermaid*, for a whaling voyage not exceeding four years in length. In February, 1870, when the vessel was cruising off South Australia, the fourth mate's boat, with six men, was separated from

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the ship, and, after being out for two days with a very insufficient supply of food, they made the land at a point where there were no inhabitants. Three of the men walked overland to George's Bay, where the ship was expected to be found, and joined her. This took them about a week, and they were on the sick list after their arrival. The fourth mate and the remaining two men, of whom the libellant was one, went in the boat to Vasse, the nearest port, which was about two hundred and fifty miles from George's Bay by water, and was the only port they could make with the wind they had. The master's next cruise took him within about one hundred miles of Vasse, and he would have gone in there for the boat and the men, but that the wind was ahead and blowing hard, and he thought it would take too much time to wait for a change of wind.

The libel set up that the master neglected his duty in not calling for the libellant at Vasse. The answer averred that the libellant deserted the ship.

C. T. Bonney, for the libellant.

C. W. Clifford, for the respondent.

LOWELL, J. A case tried upon depositions, taken four years after the events occurred upon which the dispute arises, is not in the most satisfactory position for clearing up doubtful constructions of conduct. I think the preponderance of the evidence is, that the fourth mate, and the two men with him, not only did not desert the ship, but were not understood to have deserted her. The master knew where they were before he was told, which is pretty good evidence that they were in the right place. He knew they would be there when he called for them, and intended to call. He says he received a letter from the consul at Vasse, promising to detain the boat until he came. But the letter is not produced; and there is not the least reason to believe that the men had any intention of leaving Vasse or removing the boat. They remained there for several weeks after the ship had left them behind.

The master does not testify that he entered the mate and men as deserters on his log-book, or reported them as such to the nearest consul, or to the authorities at home; all which he was bound to do, if he believed the truth to be so. Neither the log-

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book nor the copy of the articles that was on board the ship is produced. I do not know when he considers them to have deserted. Certainly not when they determined to stay by the valuable whale-boat and gear, rather than to take the chances of a week's journey overland in an unknown country. What were they to do? They could not stay in the uninhabited spot, where they first landed, without starving to death. Three of them tried the overland journey, and three sought the nearest and only available port. The former were the more fortunate; but I do not know that their course was more reasonable at the time it was undertaken.

It is clear to a reasonable intent that the ship deserted the men, and not the men the ship. Then the question remains whether this was such a breach of duty or contract on the part of the master as will entitle the libellant to damages. I am disposed to believe that the master decided this matter according to his best judgment. He had no interest to leave the boat or the men behind him; and I may well assume that his decision was in accordance with the interests he was bound to consult. In this I follow the same rule that I have applied to the conduct of the fourth mate, when he determined to make sail to Vasse, instead of leaving his whaleboat upon the beach, and going overland to George's Bay. It was not a case in which humanity required that the men should be rescued at all hazards. They were in a country where they could take care of themselves, and had some opportunities to obtain employment and a passage home, though such opportunities do not appear to have been very frequent. At all events, they did not apply for relief to the consul, or the person who acted as such.

What are the rights of the parties in such a state of things? By the articles an officer or man who is prevented by sickness or death from performing the whole voyage is to have his lay in the proportion which the time he served bears to the whole length of the voyage. This has often been held to be a reasonable stipulation. The same rule was adopted by Judge Sprague, where a minor justifiably but voluntarily left a whaling-ship in a foreign port: *Louvrein v. Thompson*, 1 Sprague, 355. Where two seamen, on occasion of a collision, induced by sudden and reasonable fear, jumped on board the colliding vessel, and the master

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of their ship was unable to lie by for them, it was held that they had earned wages to the time of their separation from the vessel: *Hanson v. Rowell*, 1 Sprague, 117. In that case the judge said, that if the master had left them on board the foreign ship, without sufficient excuse, they should have had wages for the whole voyage.

This case does not seem to be precisely covered by either of these decisions. The men, in my opinion, failed to rejoin the ship, not only justifiably, but by a sort of compulsion. I do not find in the evidence, what I understand to be argued, that a vessel sailed from Vasse to George's Bay while the men were waiting at the former place, and that by not taking passage in her they neglected a known opportunity to rejoin the *Mermaid*. If the fact is so, it is not proved. As the case stands, the question was, whether the three men should undertake the voyage to George's Bay in their whale-boat, or wait for the ship to pick them up; and both parties acted on the supposition that the ship would call at Vasse, as she might easily do under ordinary circumstances. Notwithstanding these differences, the case is very like many in which the sickness of a seaman requires him to be left behind without any fault of his own, and he cannot rejoin the ship, though, if the master could wait a day or two, he might resume duty. In such a case the owners are bound to pay the expenses of the seaman's return to his own country: *Brunent v. Taber*, 1 Sprague, 243. This return of seamen is a policy very deeply ingrained in our commercial law, and is fairly applicable to a case of this kind. In this case, however, there is the circumstance that the fourth mate found himself in possession of a boat and its equipments, which the master values at \$230. After he had been left at Vasse, he sold these things for some price not known to the libellant, and out of the money he appears to have paid the board of himself and the other men. This, perhaps, ought to be considered an equivalent for the passage money, in the absence of evidence of what the expenses were or the passage money would have been.

Then comes the question of the libellant's clothes. The master sold them by auction to the other men, according to a usage which has, I suppose, been of long standing in these voyages, in

Re Langdon.

cases of death or desertion. By the shipping act, passed after the time of these transactions, a master is authorized to sell, in this mode, any clothes or effects of a seaman dying during the voyage: Act of 7th June, 1872, § 43, 17 Stats. 271. Following out the analogy of an involuntary breaking up of the service, the master would seem to have adopted a justifiable course in disposing of the libellant's effects by auction. The amount realized seems small; and if there were reason to suppose that any error could be shown in the account, or any negligence in keeping the goods, I should be disposed to permit an inquiry upon these matters. As the evidence stands, I find myself authorized to decree only the sum received, with interest, which in all is thirty-three dollars. I understand it to be admitted that the libellant had been paid more than his lay would be for the eight months of his service.

Decree for the libellant for \$33 and costs.

Re LANGDON.

JANUARY, 1875.

A resolution of composition, by which the creditors agree to accept payment in notes, is bad in substance.

Semble, that the payment may be made by instalments, which may be secured by notes.

LOWELL, J. The resolution for composition, which appears to have been duly passed and confirmed, is bad in substance. It is, that the bankrupt pay fifty per cent of his several debts in the "notes of the said Langdon indorsed by M. L. Bidwell and P. C. Langdon, and payable in six, nine, and twelve months from the date of the passage hereof, without interest."

Judge Blatchford has decided that the statute, requiring the payment to be in money, does not mean that all the money must be paid in one sum; that the payment may be by instalments, and may be secured by such notes as the resolution may clearly designate. I am informed that at least one other judge has taken a similar view of the meaning. I have ordered a resolution to

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be recorded which undertook to pay seventy per cent, in four equal instalments, the payment to be guaranteed in a certain mode agreed upon. I do not think the statute can be worked to any great advantage, if this is not its construction ; and the language used certainly admits of it. It refers to money as contrasted with any other property. If the payment is not to be made instantly, I see no ground for saying it may not be divided into instalments, as well as deferred for a week or a moment beyond the time actually necessary to pay the money. In short, money does not mean cash on the nail, or on demand, but that, whenever paid, it shall be in what the law admits to be money.¹

But this resolution is distinctly for a payment in notes, which is a very different thing ; for the instant the notes were taken or tendered, the payment, according to the resolution, and especially as interpreted by the law of Massachusetts, would be complete ; and certainly these notes are not money. Notes, by the law of Massachusetts, are presumed to be accepted as payment, unless the contrary appears. This is not the law as congress would probably understand it. It is not so held because notes are money, but because they are supposed to be a better security than an ordinary book-account or oral promise, and may be understood to have merged or become a substitute for the less convenient security. It is impossible to hold that this resolution provides for a payment in money. The distinction, though nice, is important ; because, if a composition is payable by instalments, and some of them are not paid, the remaining debt revives, while a payment by notes diminishes the debt itself, as soon as they are taken. I am willing to admit that the resolution might possibly be construed to mean that the notes are only security, but that idea should be clearly expressed.

Motion to record resolution denied.

¹ It has now been decided in the circuit court for this district, affirming the judgment of this court, that the payment may be by instalments, secured by notes: *Ex parte South Boston Iron Co.*, May Term, 1876.

Ex parte Briggs. — Re Smith.

Ex parte BRIGGS. — Re SMITH.

JANUARY, 1875.

Where a surety of the bankrupt, upon a bond to dissolve an attachment, paid the debt of a creditor who was opposing the bankrupt's discharge, the only motive of the surety being, by procuring the discharge, to save his own liability on other bonds held by creditors who had not objected, and the bankrupt was not consulted about, or informed of, the payment until afterwards, and had no part at all in it, and had made no promise to repay the amount, — *Held*, this payment was not made by the bankrupt, or in his behalf, under sect. 29, and would not vitiate his discharge.

It seems, that any act or neglect of the bankrupt, which, if duly objected and proved, would have prevented his discharge, will be ground for setting it aside, under sect. 34, as having been fraudulently obtained, although such act or neglect may not have been fraudulent in the usual sense.

APPLICATION TO ANNUL DISCHARGE. — C. A. Briggs & Co., creditors of the bankrupt, within two years after the discharge heretofore granted to him, applied to the court, under sect. 34 of the statute of 1867, to annul the same. They specified five acts as fraudulent within the meaning of that section: three of preference to creditors; one, the failure to keep books of account; and the fifth, that one Tucker, in behalf of the debtor, and he being privy thereto, had, by a pecuniary consideration, induced and procured certain objecting creditors to withdraw their opposition to the debtor's discharge. The applicants had not entered an objection in the case, and alleged that they had no knowledge of any of these acts before the discharge was granted.

It was proved that the debtor was a tradesman, and had kept no cash account. Tucker testified that he was surety on three or more bonds to dissolve attachments in suits pending against the debtor at the date of his bankruptcy, in one of which these applicants, and in others the original objecting creditors, were plaintiffs, and he thought there were more, but could not now recollect; that being called on by the attorneys of the then objecting creditors, and being satisfied it was for his interest to do so, he had paid the debts of the objecting creditors, and procured them to withdraw their opposition; that his motive was to protect himself from other bonds, including that given to

Ex parte Briggs. — Re Smith.

these applicants; that he had no communication on the subject with the bankrupt before or since, excepting to inform him that he had settled the case; that he paid his own money, and had no promise or expectation of receiving any thing from the bankrupt. The testimony of the debtor confirmed that of Tucker, excepting that he did not know whether he first heard of the payment before or after it was made.

J. A. Loring & W. E. Jewell, for the petitioners.

T. L. Livermore, for the bankrupt.

LOWELL, J. Two questions have been argued: 1, Whether the neglect by a tradesman to keep proper books of account is good ground for setting aside his discharge in bankruptcy after it has been granted; 2, Whether payment by a surety of the bankrupt, for his own purposes, to induce a creditor not to oppose the discharge, comes within the prohibition of the statute as a payment by the bankrupt, or "in his behalf." Sect. 29 (Rev. Sts. § 5110).

1. This application is under sect. 84 (Rev. Sts. § 5120), which empowers any creditor who desires to contest the validity of the discharge, on the ground that it was fraudulently obtained, to apply in writing to the court, setting forth which in particular of the several acts mentioned in sect. 29 he intends to give evidence of, and to prove such fraudulent acts, &c. By sect. 29 the discharge is not to be granted, or, if granted, to be valid, if any of the several acts or neglects therein mentioned are proved against the bankrupt. Now, the question is, whether the discharge is "fraudulently obtained," and is to be set aside, if the particular acts and neglects relied on are not fraudulent, in any usual sense of that word. The neglect to keep a cash-book was certainly not a fraud in itself; and the point is, whether every certificate which might have been successfully opposed, if the creditors had the necessary information to enable them to object, is fraudulently obtained, in the sense of sect. 84, if it is obtained upon an unfounded presumption or appearance that the debtor is fully entitled to it. The section, as we have seen, seems to say, that any thing which might have been objected at first may be brought up during the two years, provided the creditor was not informed of the facts at the earlier time.

Ex parte Briggs. — Re Smith.

Under an English statute which very strongly resembled the first part of sect. 29, Lord Mansfield expressed himself to be decidedly of opinion that a certificate which ought not to have been granted by reason of concealment might be said to have been fraudulently obtained: *Robson v. Calze*, 1 Doug. 228. The meaning, I suppose, is, that it was a constructive fraud on the court to obtain a certificate which was not justly due. If this be the true construction of our own statute, some part of the apparent discrepancy in the different clauses disappears; because the constructive fraud would be proved by showing that the discharge was wrongly obtained. Upon the whole, taking all the clauses together, I am inclined to think that they give a creditor the right to set aside the discharge for any acts or omissions which would have been just cause for refusing it in the first instance, and that "fraudulent" is used in an enlarged sense to designate any acts which the statute prohibits. I do not decide this point, because I find upon the evidence that these creditors had knowledge of the neglect to keep books before the discharge was granted.

2. The law of Massachusetts being that the discharge in bankruptcy of the principal debtor, duly pleaded, discharges a bond to dissolve an attachment, the surety, Mr. Tucker, found it for his interest to procure a discharge for the bankrupt. In doing this he was obliged to satisfy those creditors who had made opposition. It is clear that this was the motive of his action, and that it was taken without consultation with the bankrupt, without regard to his interests, and with no promise, expectation, or probability of ever receiving from him any indemnity of any sort. The original objectors may have brought themselves within sect. 35 (Rev. Sts. § 5181), which enacts, that if a creditor shall obtain any sum of money, &c., from any person, as an inducement for forbearing to oppose, &c., they shall forfeit double the amount, &c. But the bankrupt ought not to be deprived of his discharge by a payment made in the way and with the motive proved here. By sect. 29 the payment must be made by the bankrupt, or in his behalf. Now, I do not intend to say that payment by a friend, actually made in behalf of the debtor, with his knowledge, is not prohibited, nor that very slight evidence would not affect him with participation; but one made behind

Ex parte Briggs. — Re Smith.

his back, and for the very purpose, perhaps, of vitiating his discharge, should not have that effect. Such a payment would be a fraud on the bankrupt. This payment was made by the surety in his own behalf. He was under no obligation to treat all attaching creditors alike, nor to take or abstain from any course of action that might serve his own interests.

Under the English statute above referred to, it was held that a payment by any one to induce a creditor to sign the certificate, would avoid it. And it may be that an assent of one creditor, so procured, would, under our law, vitiate the discharge, if the action of that creditor had, or might have had, an influence on the others. But that would be on the ground of fraud on those who were so influenced. Lord Eldon twice expressed regret that the law, in his time, had been settled as it was: "It is very hard, but it is settled, that, if a friend or foe of the bankrupt gives money, though the bankrupt was in no degree privy to that transaction, and never would have consented to it, the certificate is void:" *Ex parte Hall*, 17 Ves. 62; and on another occasion: "I feel it very difficult, upon attention to any principle that has furnished this rule, to support the doctrine that a bankrupt is not to have his certificate, if, though he would abhor such means of procuring it, some too active friend has advanced a sum of money to obtain it:" *Ex parte Butt*, 10 Ves. 360.

It is entirely clear that Tucker acted neither as a friend nor an enemy of the bankrupt, but simply for his own sake; and not only because our law has a phrase which the English law did not have, namely, that the payment is to be "in behalf" of the bankrupt, but on the ground of justice and fair dealing, which the learned lord chancellor alludes to, I am of opinion that a payment of this sort, distinctly and unequivocally proved not to have been made with the bankrupt's assent, or with any regard to his rights or interests, ought not to avoid his discharge.

I look upon this as an exceptional case. If the creditor who was bought by the surety had signed the assent, so that others might be misled; or if the vote of creditors were necessary, and he had joined in it, as in cases of composition; it would be no answer to say that the debtor was innocent; for the rights of others would have been prejudiced, and by illegitimate means.

Ex parte Jewett. — Re Morris.

This decision will, therefore, hardly make a precedent for any that is likely to arise after it.

One of the allegations of the petition is that the payment was made with the privity of the bankrupt. This is intended to meet and negative the oath taken by the bankrupt, as required by Rev. Stats. sect. 5113, that he has not done, suffered, or been privy to any act, matter, or thing specified by the statute as a ground for withholding his discharge. I am not satisfied by the evidence that the bankrupt was privy to this payment, even in the sense of being informed of the intention to make it before it was made. Whether privity does not, in this connection, mean a little more than knowledge, and include some connection with the act, or some unexercised power to prevent it, may perhaps be questioned.

Judgment for the defendant.

Ex parte JEWETT. — Re MORRIS.

FEBRUARY, 1875.

The allegation in a creditors' petition for adjudication of bankruptcy, that the petitioners constitute the requisite amount and number of all his creditors, is not the allegation of a jurisdictional fact.

Such an allegation may be amended after a meeting for composition has been held, and when the question of the acceptance of the resolution is before the court.

A case is pending in bankruptcy, within sect. 43 of the bankrupt act, as amended June 22, 1874, so that a composition may be proposed and made, though the verification of the petition is defective.

In the absence of fraud, a defect in the verification of the creditors' petition is waived by the debtor, when he calls a meeting for composition; and the dissenting creditors cannot take advantage of it.

Every creditor, authorized to vote at a meeting for composition, has a right to make suitable inquiries of the debtor.

How this right is to be reconciled with that of the meeting to regulate its own proceedings, *quære*?

Until these rights are found to be irreconcilable, it is the duty of the court to refuse to record a resolution passed at a meeting at which a creditor's right of inquiry was, by a vote of the meeting, postponed, against his will, until after the resolution had been voted on.

Where a creditor, believing in good faith that a larger offer might be made by a compounding debtor, bought up enough of the debts to prevent the acceptance of the resolution, publicly offering to pay at the same rate for all other of the debts, — *Held*, he could vote upon the debts so bought.

LOWELL, J. The petition of creditors against the supposed bankrupt was made and filed, and before adjudication the respondent called a meeting of his creditors, at which a resolution for composition was passed; and the hearing has now been had upon the acceptance thereof. The original petition was defective in this, that by a clerical mistake it averred that the petitioners constituted the requisite number and amount of the creditors of the said A. B., naming one of the petitioners, instead of the respondent. This defect was overlooked until now, when it is objected that without a distinct and accurate allegation on this head there is no jurisdiction. A recent decision of an able and learned judge was cited in support of this position: *Re Rosenfelds*, 11 N. B. R. 86. Notwithstanding my respect for that decision, and after careful consideration, I cannot admit that the number and amount of petitioners has any thing to do with the jurisdiction of the court. Congress has very carefully provided that such a want of parties shall be taken advantage of as a strictly dilatory plea, and be disposed of in a summary way, not for the purpose of ascertaining the jurisdiction of the court, but the sufficiency of the plaintiff's petition, which is a very different thing. If the court should decide wrongly on that point, its decision would bind all the world.

The district court has jurisdiction in bankruptcy of every person residing within the district, who owes three hundred dollars of provable debts; and when a paper which purports to be a petition in bankruptcy, and which alleges such residence and indebtedness, is filed, and an order of notice has been duly served, there is and can be no jurisdictional fact remaining, if the residence and indebtedness to the extent of three hundred dollars are admitted. The court may then proceed to allow or refuse amendments, or any thing else proper for a court to do that has undoubted jurisdiction of the subject-matter and the parties. Indeed, if due service has been made, it could properly allow those jurisdictional allegations to be amended. To put an extreme case, let us suppose that the petition distinctly averred that the petitioners were *not* the requisite number, &c.; the mistake of course would be clerical, but it might not be discovered, and there might be an adjudication. The decree would

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be erroneous, but it would not be void ; and no court could correct it, excepting the court in bankruptcy, either subordinate or appellate, upon a direct application for that purpose ; and it would be such an error as might be amended after almost any lapse of time. The mistake here is of that sort, though not as palpable ; and the motion to amend is granted, though, in my opinion, no amendment is necessary. The statute gives the debtor a right to propose a composition whenever a case in bankruptcy is pending by or against him ; and the objection just considered, as well as the next in order, depend upon the proposition that a case is not pending when the court has no jurisdiction of it, which may be admitted. But when the court has jurisdiction of the subject-matter and the parties, it will not be easy to point out a defect in pleading which would prevent the case from being a case.

The second point relates to the verification of the creditor's petition. The petition was properly made by the several firms, and the signature was that of the firms ; and the *jurat* also properly sets out the individuals who made oath. The *jurat* in this way comes to vary in form from the signatures. My impression is that the verification is sufficient ; but I do not decide it, because, in my opinion, the case is pending whether the verification is regular or otherwise ; and not only so, but the objection may be waived by the debtor, and has been waived, no question being made of the *bona fides* of the petition.

The next objection brings up an important practical question. The statute provides for a meeting of creditors, and requires the debtor to be present, and to answer any inquiries made of him. The debtor was present in this case, and ready to answer inquiries, but the meeting voted to proceed to the consideration of the resolution. After that had been voted, the objecting creditors declined to make any inquiries.

It was the opinion of the able and learned register, who acted as chairman of the meeting, that the statute means that the debtor shall answer any question put by the meeting, or with its consent ; because otherwise it will always be in the power of a minority, however small, to work a dissolution of the meeting by protracting inquiries until the patience of the meeting is exhausted, and because a meeting imports a body entitled to

govern its own proceedings. On the other hand, it is insisted by the objecting creditors that the statute is intended to protect the minority, and enable them to instruct themselves and the majority upon the expediency of the proposed composition, before it is voted on. At the argument I asked counsel to look up the English cases, and several have been furnished me; two of which had been printed, and had reached this country before our statute, which follows exactly the English law in this respect, was passed: *Re Davis*, 19 Weekly Reporter, 524; *Ex parte Levy*, id. 586; *Ex parte Mackenzie*, 23 id. 121. In these cases it is taken for granted that any creditor may make inquiries at the meeting. In one of them, the point was taken that a refusal to answer was no objection to the proceedings, unless the sense of the meeting was taken; and though the point was not overruled, (the court deciding in favor of the party taking that point), yet it was not noticed in the judgment, which it might well have been, if considered by the court to be sound, as it would have disposed of the matter without going, as the judgment did, into the materiality of the particular question put.

I have heretofore refused to order the examination of a debtor who had called a meeting for composition, on the ground that the statute gave a right of inquiry (though the answers would, perhaps, not be on oath) at the meeting. And it seems to be the obvious intent of the act that inquiry may be made by any person entitled to inquire. In one of the cases cited, the decision was that the debtor's solicitor might advise him whether to answer or not, and that he need not answer an immaterial question, but that a refusal to answer would be at his own risk. In another, the ruling was like that which I have referred to, that the true place for examination was at the meeting.

Upon the whole, I am of opinion that the courts ought not to take for granted that the law will be found impracticable unless by giving it a somewhat forced construction; and it is only on that assumption that there can be much ground of hesitation. There is no suggestion in the English cases that any difficulty has been found in conducting the inquiry. The matter may, perhaps, be regulated by the supreme court, by rule, and in the mean time by the district courts. I feel it my duty to overrule the opinion

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of the register ; but if the debtor desires it, leave will be granted to call another meeting, as the point was nice and important.

A new meeting was called in this case, in accordance with the foregoing intimation of the court, and the debtors were examined ; and while this was going on, the objecting creditors bought some of the debts, under circumstances stated in the following opinion of the court, and thus defeated the resolution, if the debts thus procured were to be counted. The purchaser offered publicly at the meeting to pay twenty-five per cent for all the debts, the offer of the debtor being twenty per cent.

R. Stone, Jr., for the debtor, maintained that these debts could not be reckoned in ascertaining the amount required, and cited *Ex parte Cobb*, 29 Law Times, N. S. 123 ; *Ex parte Fore Street Warehouse Co.*, 30 id. 624.

H. R. Brigham, for the opposing creditors.

LOWELL, J. At the former hearing, I thought and said that the evidence tended to show that the debtor might have offered a little more than he did, but intimated that it might require a greater discrepancy, or some evidence of fraud, to make it my duty to refuse a resolution which the creditors had voted. Before or at the second meeting, and before the vote was put, the objecting creditors bought up enough of the debts to enable them to defeat the resolution.

It is insisted that the debts thus bought ought not to be reckoned, or permitted to be voted upon, at the meeting. The English cases cited show that, where debts have been purchased in order to carry a composition, the resolution will be held to be tainted with fraud. I do not think that the like rule can always be applied to the purchase by a dissenting creditor. In the one case, the evidence tends, almost conclusively, to prove that there must be some motive at work besides the interests of the creditors ; for instance, where the composition offered was 2s. 6d., and the purchase was made at 10s., the court had a right to infer that there was some secret contract to reimburse the purchaser. Whether there were or not, the transaction amounted to a preference of the creditor whose debt was bought. The vote of assent was virtually his, and he had been paid more than the

others. Such cases are common, and are held fraudulent in all courts, whether they relate to discharges in bankruptcy, to compositions at common law, or in any other way in which such a question can be brought up.

But I have never known a case in which a creditor has been bribed not to assent to a debtor's discharge, or not to sign a composition deed. There is no very apparent occasion or inducement to fraud on that side, though, possibly, there may be oppression.

I do not say that clear evidence of hostility or spite, for the indulgence of which an enemy may be willing to pay, would not authorize the rejection of his vote. But there is no such presumption of an improper notice, as exists in the cases cited, because its existence is very improbable.

Looking at the facts here, it seems probable that the purchaser of these debts may have supposed that the debtor's assets would fairly pay all that he has chosen to give for these debts. That agrees with the impression which the evidence left upon my own mind ; and, if this is so, I see neither fraud nor oppression in the action of the creditor. I said in my former opinion that a debtor appears to have under the statute a margin between what he can realize from his assets and what an honest and skilful assignee in bankruptcy can obtain ; and if the creditors can fairly manage to defeat the debtor's attempt to realize this margin, thinking, perhaps, that they shall thus secure it for themselves, I cannot hold that to be a reason for rejecting their votes. It is their property, after all, that he is saving for himself.

It was argued that, by sect. 22 of the bankrupt act (Rev. Sts. § 5077), no debt is provable which is procured for the purpose of influencing the proceedings in bankruptcy, because the creditor must swear that he has not procured it for that purpose ; and that we ought to adopt the analogy in proceedings for composition, because those creditors only are to vote at the meeting whose debts are provable.

I have known very few cases, either under the bankrupt act or the law of Massachusetts, from which this form of oath was borrowed, which have touched this matter. I do not know what it means. I see nothing objectionable in itself in a person's buying a debt for the sake of influencing the proceedings, excepting it be

Re Foye.

in some such way as has been already referred to ; that is, to vote for the bankrupt's interests, without regard to those of his creditors. I do not believe the oath has had the least effect upon the settlement of cases in bankruptcy, nor do I consider it to apply to resolutions for composition. That debts may be assigned pending the proceedings in bankruptcy, is settled ; and it is taken for granted as applied to compositions in the English cases. This being so, I think some illegal motive should be shown, beyond the mere desire to defeat the composition upon the ground that it is not for the best interest of the creditors to accept it.

Motion to record resolution denied,

Re GEORGE F. FOYE.

MARCH, 1875.

The costs of an attachment, laid by the wife of the bankrupt in a libel for divorce, are not provable in the bankruptcy, and are not an equitable charge against the assets in the hands of the assignee.

LOWELL, J. The bankrupt's wife sued for a divorce, and by order of one of the justices of the court in which that cause was pending, passed in accordance with a statute of Massachusetts, she attached his personal property, to answer any decree for alimony, and incurred large costs in the custody thereof. Before that suit was decided, the husband became bankrupt, the attachment was dissolved, and the chattels came to the possession of the assignee. The wife now applies for an order that her costs may be paid her in full.

The insolvent law of Massachusetts provided, that, when an attachment should be dissolved by the proceedings of the defendant in insolvency, and the plaintiff proved his debt, his costs should be a privileged claim upon the assets : Gen. Stats. ch. 118, § 127. In *Fortune's Case*, 1 Lowell, 306, I worked out an equity in favor of attaching creditors, for their costs incurred in putting the property into the custody of the law, for the general benefit.

It is insisted, on behalf of the petitioner, that she has an equity like that which was admitted in *Fortune's Case*. I do not think

Re Bennett & Amos.

so. She has no provable debt, and whatever she may hereafter recover in the way of alimony, and for costs, will be a valid debt against her husband, notwithstanding his discharge in bankruptcy. In the case cited, the debt and costs would have been barred; and the costs were not even provable as an ordinary debt, and unless they could be paid by a sort of equitable privilege, they could not be paid at all. Besides, the action in behalf of the wife is not one which I could presume, as in the case cited, to have been intended for the general good. It was brought for a *quasi* tort, and tended to diminish the fund which would have inured to creditors. Suppose a writ of replevin is brought against the bankrupt claiming all his personal property, but the action is finally decided in favor of his assignees, it might be argued that, but for the replevin, the bankrupt would have squandered his estate, and therefore the costs ought to be allowed.

It seems to me that the statute of Massachusetts adopted the true equity. Some bankrupts, indeed, may not be discharged, and then the debt and costs might be recovered; but those cases form a very small fraction of the whole number. If the bankrupt is discharged, those plaintiffs whose debts or demands are not provable, have, to be sure, lost their original security, which is a hardship; but, on the other hand, they hold their full claim, and may levy it out of the future acquisitions of the bankrupt. The debt not being a provable one, its incident is not so, either as privileged or otherwise.

Petition denied.

R. M. Morse, Jr., for the petitioner.

C. Blodgett, for the assignee.

Re BENNETT & AMOS.

MARCH, 1875.

Where one partner of a firm, which had been dissolved, petitioned for an adjudication of bankruptcy against himself and his late copartner, and it appeared that the petitioner had undertaken to pay all the joint debts, and had given a bond to the defendant, with a solvent surety, conditioned for such payment, and that the creditors did not desire an adjudication, and that the defendant was solvent,—*Held*, that the petition must be dismissed.

Re Bennett & Amos.

A partner petitioning, under such circumstances, against himself and his copartner, must prove that the latter is insolvent in the ordinary sense of being unable to pay his debts, including the joint debts.

Semble, the court would have power to retain such a petition until the solvent copartner should have paid the joint debts.

BANKRUPTCY OF PARTNERS. — Bennett petitioned for adjudication against himself and his late partner, Amos. It appeared in evidence that the firm was dissolved in December, that Bennett received a conveyance of all Amos's interest in the joint property, and undertook to pay all the joint debts, and that Bennett gave a bond to Amos, with one Haynes as surety, conditioned to pay all said debts and to save Amos harmless therefrom.

The plaintiff and defendant had kept an eating-house together for about a month, had not agreed in the management of the business, and had separated upon the terms above mentioned: debts for furnishing and supplying the rooms were still outstanding to the amount of \$2,000, or more. Amos testified that he was solvent. It was admitted that Haynes, the surety, was abundantly able to respond.

W. W. Blackmar & H. N. Sheldon, for the petitioner.

I. T. Drew & A. Russ, for the respondent.

LOWELL, J. I ruled in *Stowers's Case*, 1 Lowell, 528, that a partner would not necessarily be estopped from filing a petition in bankruptcy against the firm, by the fact that, upon a recent dissolution of the partnership, he had undertaken to pay all the joint debts. The point is a nice one, but does not need to be reviewed at present.

In this case, the evidence decidedly preponderates in favor of the proposition that Amos is not insolvent. The definition of insolvency which applies to traders in matters connected with preferences, namely, a present inability to pay the debts as they mature, does not govern a case of this kind; because the retired partner is not necessarily insolvent in not paying debts for which he had received an indemnity, and which ought to be paid by the remaining partner.

Sect. 36 of the bankrupt act (Rev. Sts. § 5121) does not expressly provide under what circumstances two partners may be adjudged bankrupt, on the petition of one of them; but by neces-

sary intendment refers us to sect. 11 (Rev. Sts. § 5021), which requires a debtor to set forth in his petition that he is unable to pay his debts in full, not that he is unable to do so when and as they mature. Accordingly the form of a petition by copartners, as prescribed by the supreme court, avers that the members of the copartnership owe debts which they are unable to pay in full; and the petition in this case follows that precedent.

Now, I do not doubt that for many purposes under the bankrupt act a firm may be considered insolvent when its joint assets will not enable it to pay its joint debts as they mature. But I do very much doubt whether a partner of undoubted solvency can be made bankrupt by his copartner by evidence that the firm is insolvent in that sense. If there has been a joint act of bankruptcy, the creditors may proceed against both; but in that case the solvent partner would have an opportunity to clear himself by paying all the joint debts, which he cannot safely do by intrusting the money to his insolvent copartner.

In *Thompson v. Thompson*, 4 Cush. 127, which is a leading case upon the above-mentioned definition of insolvency, the remarks of the court seem to take for granted, that, if the firm cannot pay its debts as they mature, either partner may petition. But the point was not decided in that case, and has since been held otherwise by the same court: *Pierce v. Stockwell*, 11 Cush. 286; *Hanson v. Paige*, 3 Gray, 239. In the latter case, Thomas, J., in delivering the judgment, and dealing with the objection that it was not alleged in the petition that the partners in their individual capacity were insolvent, says, "We cannot doubt that there must be a substantial averment of this fact; for if one of the partners were solvent, such solvent partner would have the legal right of settling the affairs of the partnership. . . . Again; as each partner is liable *in solido* for the debts of the company, a partnership cannot, with strictness, be said to be insolvent, while any of the partners are able to pay its debts." p. 242. In this case there is no evidence that the firm is insolvent in any sense, excepting that certain of its debts are outstanding and overdue. The evidence seems to prove that the bankruptcy was contrived between Bennett and the surety on the bond, and was intended to work in some way for the benefit of the latter.

Re Bennett & Amos.

Whether he could escape his liability in this way I do not say, but he seems to have been advised that he could ; while, on the other hand, the creditors appear to be content to rest on the responsibility of Amos, fortified as it is with the bond and the admitted ability of the surety. Several of them have so testified. This bond seems, of itself, to make Amos solvent, since he is not proved to owe any considerable amount of separate debts, and it would work a delay and injury to the creditors, though they might not suffer eventual loss, to complicate the matter by proceedings in bankruptcy.

The English law had formerly a great deal to say about concerted bankruptcies, and a great many adjudications were set aside by the lord chancellor, and afterwards by the courts of bankruptcy, because they were obtained from bad motives, and to work some collateral result other than the benefit of the creditors. I doubt if our law, or, indeed, the latest statute in England, leaves much discretion to the courts in this matter. Under our statute there would seldom be occasion for the exercise of such a discretion, and I have seen no statute or decision which gives or claims it in express terms, though there are some intimations one way and the other. I am not at present satisfied that it exists.

A recent amendment to the bankrupt law makes a collusive bankruptcy possible at present. It gives an advantage, in respect to a discharge, to those debtors who are put into bankruptcy against their will, and thereby encourages an actual delay on the part of insolvent debtors in coming before the court, while the same law throws difficulties in the way of the creditors, by requiring a certain proportion of them to petition. The consequence is, a temptation to debtors to procure a petition to be brought against them, and to admit the sufficiency of one that is insufficient. Before this amendment, a collusive bankruptcy was unknown, in fact, and useless to any one, because our proceedings gave no advantage to one sort of bankruptcy over another. But even now, if it should be discovered in the course of the proceedings, after adjudication, that the petition was collusive, or insufficient, the remedy probably would be, not a dismissal of the proceedings, but a denial to the bankrupt of the peculiar benefit

Re Whipple.

which involuntary proceedings give him. Assuming no discretion in this case, yet as I find the petition to be brought by one partner for ends of his own, it becomes me to require the petitioning partner to make out his case fully and clearly. I am not satisfied that the petitioner Bennett has made out the insolvency of his late partner Amos, the defendant, under any test which can be applied in such a case. I adhere to an intimation which I made in *Stowers's Case*, that the court probably has power to see that the joint debts are paid before dismissing the petition, if any creditors request such action ; but there is no such application in this case.

Adjudication against Bennett only. Petition dismissed as to Amos.

Re WHIPPLE.

MARCH, 1876.

In deciding whether a composition should be approved or rejected, it should be compared with what the creditors would receive through an assignee, not with what the debtor might possibly be able to pay them.

The act of congress puts upon the judge the responsibility of approving or rejecting a composition.

It cannot be assumed that any composition accepted by the required proportions of creditors is preferable to bankruptcy.

BANKRUPTCY. — COMPOSITION. — The bankrupt offered a composition of thirty-three and one-third per cent, which was accepted by more than the necessary proportion of creditors in number and value, but was opposed by a minority.

The evidence tended to show that the assets consisted principally of two pieces of land, with the buildings, &c., one of which was the planing-mill, machinery, and fixtures, where the business of the debtor was carried on. In his list he valued this property at \$12,000, subject to a mortgage for \$2,000, and the other, which was a lot of land with four tenement houses, at \$7,000. After deducting from the aggregate of debts those that were either secured or privileged, and from the assets all liens

Re Whipple.

and privileges, there remained, according to the debtor's statement, assets of the value of \$15,000 to pay debts of somewhat less than \$33,000. The creditors insisted that the assets applicable to the unsecured debts were worth at least \$19,000.

W. S. Gardner & G. W. Morse, for the objecting creditors.

T. Weston, Jr., & N. Tebbetts, for the bankrupt.

LOWELL, J. Our system of ending bankruptcy by a composition has been borrowed from England, and theirs was borrowed from Scotland. In the latter country, the court was at one time required to pass upon the reasonableness of the offer of composition; but in England the action of the creditors is final, in the absence of fraud. I have looked at the decisions in the courts of both countries. They are well worth referring to, but are not numerous enough to have brought the subject up in all its possible aspects, or to enable us to reconcile some seeming contradictions in the *dicta*.

In Scotland the disposition was strong to uphold, as reasonable, a composition that was fairly adopted; and in England, on the other hand, to set aside as fraudulent one that was decidedly unreasonable. See *Smith v. Robertson*, 8 Court of Session Cases, 1055, affirmed in the Lords, 2 Dow & Clark, 312; *Kilpatrick v. Wighton*, 5 Court of Session Cases, 895; *Ex parte Williams*, L. R. 10 Eq. 57; *Ex parte Cowen*, L. R. 2 Ch. 563; *Hart v. Smith*, L. R. 4 Q. B. 61; *Ex parte Linsley*, L. R. 9 Ch. 290.

It will not be possible to lay down many general rules. But one that I have heretofore announced I adhere to, that the judge must make his comparison, not with what the debtor might possibly have done, but rather with what assignees in bankruptcy could do. The elements of this comparison must vary with the amount of debts, the amount and character of the assets, the nature of the business that is to be wound up, and many other circumstances. How far congress intended to protect creditors against each other, and how far the court is to inquire into motives, are questions of no little difficulty. Some creditors may vote for the resolution without much inquiry, from a general and not altogether unfounded idea, that bankruptcy is to be avoided at all risks; some out of kindness to the debtor; some from a

Re Whipple.

conviction that the offer is for their own interest, as distinguished from the general interest. What is the court to do? How far to go in upholding or in setting aside?

I am of opinion, upon the whole, that congress has put upon me the difficult and delicate responsibility of rejecting a composition, even if opposed by a small minority of creditors, when it is made to appear that a settlement in bankruptcy would be more for their advantage.

It may be said that these summary settlements are made for the very purpose of enabling the debtor to resume his business; and that as the composition must be paid from the assets of the debtor, some allowance must be made from the apparent value of the assets to enable him to convert them. These considerations have force; but, as I said in another case, there is always a margin in favor of a debtor who settles his own affairs, for he can realize more than any assignee could do; and by making my comparison of the offer with the probable dividend in bankruptcy, I do, in fact, leave something in his hands for both the purposes referred to. In the case I have mentioned, I intimated an opinion that a difference of five per cent upon the amount of the debts in that case, which was small, would not be sufficient to induce me to reject the resolution.

It cannot be admitted by the courts, and is not the fact in this district, nor, I suppose, in any, that a compromise, however inadequate to the debtor's means, is better than bankruptcy. In this case, from the very simple character of the business to be wound up, the whole could be settled in two months, and at an expense, as the register informs me, of not more than \$500, including the charges of auctioneer and assignee.

The evidence of the experts, given upon the basis of a forced sale of the property for cash, satisfies me that the net assets applicable to the payment of the unsecured debts are at least \$18,000, of which the debtor offers to divide something under \$11,000, and retain something over \$7,000. This is a more convenient and intelligible mode of stating the matter than by proportions; for if the whole amount of debts was small, a loss of a large per centage might be but a small sum of money, which would be absorbed in expenses.

Re Ewing.

Taking the precise facts of this case, I think an offer which leaves so large an amount in the debtor's hands ought not to be imposed even upon a small minority of the creditors.

Motion to record the resolution denied.

NOTE. — The debtor was afterwards permitted to make a better offer, which was accepted. It is not the practice to allow a second offer to be made, without good reasons ; and such were given in this case.

Re J. E. EWING.

MAY, 1875.

In bankruptcy, the time for opening a meeting or hearing is to continue one hour from the time fixed in the order.

If the magistrate does not appear, and has not been heard from, within the hour, any party may have the meeting adjourned.

LOWELL, J. The meeting to consider the debtor's offer of a composition was called before the register at ten o'clock in the forenoon of a certain day. It happened by some oversight, for which the legal accountability must rest on the debtor as the moving party, that no formal notice of the order had reached the register. He had actual notice, and intended to be present, but was prevented, and sent no message to his office on the subject. At half-past eleven, the attorneys of the two creditors, who now object to the acceptance of the resolution, gave notice to the attorney of the bankrupt that they should attend no longer, and objected to a meeting being held after that time ; and, on the other part, a notice was given to them that the debtor intended to find the register and proceed with the meeting. The register arrived at his office at about noon, and sent notice to the counsel for the objecting creditors that he should hold the meeting at a certain hour that afternoon. One of these notices was received, and the other was not. Neither counsel attended further. The meeting was held at the hour so appointed, and the resolution was passed.

In *Gilley's Case*,¹ I held that the first general meeting of

¹ *Ante*, p. 250.

Re Ewing.

creditors ought to be kept open to receive votes for assignee for at least one hour. In the opinion then given I cited analogous cases in the practice of several States, relating to hearings before magistrates and before judges at chambers, as well as in bankruptcy and insolvency. The converse of this rule has prevailed at common law, namely, that after an hour has passed, if the magistrate is not present and has not been heard from, either party is at liberty to consider the case as discontinued or postponed; or, if the judge is ready and only one party has appeared, the case may proceed *ex parte*: see *McCarty v. McPherson*, 11 Johns. 407; *Kimball v. Mack*, 10 Wend. 497; *Dyer v. Smith*, 12 Conn. 384.

This rule is not held with so much strictness as the other. When it was shown, for instance, that no injury could have occurred to the absent party, as he had not appeared at all, the fact that the hearing was not opened until after the hour had elapsed, was decided to be immaterial: *Niles v. Hancock*, 3 Met. 568.

In bankruptcy there is even more need of a definite practice than in ordinary suits at law or hearings between one plaintiff and one defendant, because the great number of persons interested, and having a right to take part in the proceedings, increases the chances of misunderstanding and consequent injustice if the practice is loose or variable. If the matter were entirely new, the question would be whether such a meeting may be opened at any time during the day, or during what definite part of it. It could hardly be considered reasonable that the parties should be held to attendance throughout the day in hearings of this sort. Whatever law is applied to one side must apply to the other; and every creditor must have the right to be heard at any time during the day, if the debtor has the whole day in which to have the meeting opened. I think the analogous practice in so many similar hearings points to an hour as the true limit.

There is no need to lay down a rigid rule, without exceptions. In nearly every case, the register, or some substitute, can be reached within the time, and can make at the least a postponement to a fixed hour. In this case, as it is admitted that one of the creditors failed to receive notice of the postponement, I must

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hold that the meeting, held three or four hours after the time appointed, was irregular: *U. S. v. Rundlett*, 2 Curtis, C. C. 41.

Leave to record resolution refused. (Debtor may call a new meeting within one week.)

E. P. Nettleton & H. R. Brigham, for objecting creditors.

A. E. Pillsbury, for the bankrupt.

Ex parte TREMONT NATIONAL BANK. — Re GEORGE & BATTEY.

JULY, 1875.

The bankrupt is the trustee of his estate until the assignee is appointed.

A bankrupt indorser may waive demand and notice upon a note maturing before the choice of an assignee.

Semle, that a bankrupt may sue for a claim before the appointment of an assignee, if immediate action is necessary; and a plea of the plaintiff's bankruptcy is not a bar to an action, if an assignee has not been appointed.

NOTICE TO BANKRUPT INDORSER. — The Tremont National Bank held certain promissory notes of third persons, indorsed by the bankrupts, which fell due after the adjudication of bankruptcy and before the appointment of the assignee. During this period, and before the maturity of the several notes, the bankrupts, at the request of the bank through its attorney, signed a waiver of demand and notice, which accordingly were not duly made. Upon an offer by the bank to prove against the assets for the amount of the notes, the assignee objected, and the case was submitted to the court upon a written agreement of the facts above stated.

F. V. Balch, for the creditor.

W. A. Field, for the assignee.

LOWELL, J. It was decided by Lord Eldon in 1812, that when a bill is dishonored after the bankruptcy of the drawer, a notice to him is a sufficient and proper notice if his assignee has not been appointed. "The bankrupt," says the learned judge, "represents his estate until assignees are chosen." *Ex parte Moline*, 19 Ves. 216. This statement of the law has been copied into the text-books, and was the guide, most probably, of the action

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of the bank in this case. Story, Bills of Exch. § 305; Byles, Bills, 228; see *Ex parte Johnson*, 3 Dea. & Ch. 433. Mr. Robson says, notice should be given to the trustee (assignee), or if none has been appointed, it would seem the notice should be to the registrar as official trustee: Robson, Bankruptcy, 178. By our law the register is not official assignee, but the bankrupt remains, as in Lord Eldon's time, the trustee of his estate until the assignee is appointed.

Granting that notice is necessary, which is certainly the better opinion upon authority, the bankrupt is the only person who can be notified. If immediate action is necessary against the promisor or acceptor to save a probable loss, the bankrupt, on application to the court, would be permitted to prosecute. Indeed, though the bankrupt's debtors cannot safely pay him their debts after the proceedings are begun, yet I have very little doubt that he may, even without leave of court, begin any suits that are necessary to save the statute of limitations, or are otherwise of immediate urgency. It has always been one of the anomalies of the bankrupt law, but probably a necessary one, that a plea of the plaintiff's bankruptcy is not a bar to an action unless an assignee has been appointed, and not always then, unless the assignee has forbidden the prosecution of the suit, though a plea of payment to the bankrupt might be bad if the assignee should intervene. In other words, a bankrupt may sue, though he cannot, without suit, receive payment.

The creditor in this case cited the statement of a text writer, that the person on whom a demand should be made may waive it. No case was cited, but I think one is hardly necessary. Taking the meaning to be that the person referred to is one to whom notice is to be given as a party interested, or a general agent of such an one, and not a mere messenger or conduit, the remark is undoubtedly sound.

It was argued that though the bankrupt is the person to be notified as indorser of the dishonor of a note by the maker, and as such may waive the notice, yet he cannot dispense with the demand on the maker. This argument runs counter, I think, to the usual commercial practice and understanding. A waiver of demand and notice is very common, but a mere waiver of

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notice much less so. The purpose and meaning of the waiver commonly is, that the parties are well aware of the standing and situation of the promisor, and consider a formal demand and notice unnecessary for some reason or other. If the bankrupt has power to protect his estate, he has power to waive forms, and to undertake whatever action may be necessary as if such forms had been complied with. The same argument which establishes his right to require notice proves that he may waive the demand and take notice at his peril.

I am not sure that one of these notes may not have matured after the assignee was appointed; nor, if it did, whether there was any reason to hold that the assignee should have been notified, or asked to waive notice. Reserving any question that may arise on such a note, I admit the debt to proof.

Proof admitted.

Ex parte POLLARD. — *Re* THE ELIOT FELTING MILLS.

JULY, 1875.

Where A. was employed as superintendent of a factory by a written contract, which was to run for ten years, and the parties bound themselves to performance in the sum of \$10,000 liquidated damages, and, in an earlier arrangement of a like kind, had called the sum both a penalty and liquidated damages, — *Held*, a penalty.

The filing a petition in bankruptcy by a corporation, *ipso facto*, dissolves a contract with an employee, and is tantamount to a notice of its dissolution; and he may have his damages assessed, and prove the amount in the bankruptcy.

Semble, that damages for the breach of an implied contract may be proved in the same way.

If an absolute contract is broken, so that a cause of action has arisen, it is no objection to assessing and proving the damages in bankruptcy, that they may be difficult of estimation; though, where the debt is contingent, and the contingency has not happened, that consideration may be decisive against the proof.

BANKRUPTCY. — UNLIQUIDATED DAMAGES. — The manufacturing corporation now bankrupt, made, through its treasurer, a written contract, July 1, 1873, with the petitioner, by which he was to serve them as superintendent for ten years, and to transfer to them, and to another corporation having the same treasurer, all inventions which should be made by him during that time and the patents granted therefor, the corporations paying

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all expenses connected with the inventions and the patents; and the Felting Mills were to pay him \$4,000 a year and seven and a half per cent of their net profits, and to give him the use of a certain house free of rent. The parties bound themselves, each to the other, in the sum of \$10,000, by way of liquidated damages. The contract was duly performed on both parts until Feb. 16, 1875, and the petitioner had obtained and transferred four patents in accordance therewith; on that day the Felting Mills filed their voluntary petition in bankruptcy. At the first meeting of creditors, the petitioner filed a proof for the \$10,000 as liquidated damages and for some arrears of salary, and for the amount of a note of the corporation. His proof was suspended, and a part of it was disputed by the assignees when chosen. The assignees denied the authority of the treasurer to make the contract, and that there was any such breach of it as would allow of proof in bankruptcy, and disputed one of the items of set-off.

A hearing was had before the court upon the matters of fact and law, excepting the amount for which the petitioner could prove, if he could prove at all, under the contract.

T. L. Wakefield, for the petitioner.

W. P. Walley, for the assignees.

LOWELL, J. The evidence discloses that the treasurer of this corporation was the principal stockholder, and that he conducted its business affairs, referring to the board of directors such questions as he thought necessary; that he had made a similar contract with the petitioner for five years, which had expired by limitation before that of July, 1873, was entered on. Nothing was cited from the by-laws requiring such a contract to be made by the directors, and the directors are not proved to have been ignorant of this contract. I think both the petitioner's points are sustained: that the treasurer might lawfully make the contract, and that the directors may be presumed to have ratified it.

Is the sum of \$10,000 to be considered as liquidated damages? It is called so by the parties, but it is not wholly immaterial to observe that in the earlier contract the same parties bound themselves to each other "in the penal sum of \$10,000 liquidated damages." Upon reading the two contracts I do not think the

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omission of the expression "penal sum" was intended to change the character of the undertaking. The courts are very much disposed to treat these agreements for round sums as penal, that is to say, as having little or no meaning, and rightly, for I believe they are really so regarded by the parties in most cases. There are many forms of contract in which the practice is universal of inserting a sum of money, sometimes called penal and sometimes not, to the payment of which the parties bind themselves in case of a breach, and I suppose the custom has grown out of an earlier state of the common law in which an advantage was gained by such a stipulation when the contract came to be sued on. It is a singular fact, that a penal sum is still inserted in the writ of injunction used by some of our courts, though it is wholly without meaning in that place. Cases can be cited in which what the parties have called penalties are held to be liquidated damages, but it is much more common to hold stipulated damages to be penal. The decisive point in this case is, that this contract was to run for ten years; and it can hardly be believed that the parties intended that the same amount should be paid for a breach in the last month of the tenth year, as for one in the first month of the first year.

Has there been such a breach of the contract as will give the petitioner a right of proof for any damages which he may have suffered thereby against the estate of the bankrupt corporation? This is the difficult question.

It is easy to show the very great hardship of a negative answer to this question. No corporation that has been wound up in bankruptcy in this district has ever been revived in such a form as to give its old creditors redress. In most cases, here or elsewhere, a dividend is all that is left. Accordingly we find that the Companies' Act, as it is called, in England, provides for the proof of all claims and demands, certain or uncertain, present or future, in words which undoubtedly include all damages, even for torts: 26 & 27 Vict. ch. 89, § 158. And this is no more than common justice. It is to be regretted that the attention of congress was not attracted to this matter; but as the law stands, it is the same for corporations and individuals, notwithstanding the difference in their situation.

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But I am of opinion that the law for individual bankrupts gives a right of proof in such a case. It is the obvious intent of the act to give to debtors all reasonable relief, and to creditors all reasonable remedy, by permitting proof of all debts and damages arising out of contract that can be fairly found to be due before the final settlement of the estate. The courts in this country have recognized this intended liberality. Thus it was held that unliquidated damages in matters of contract could be proved under the insolvent law of Massachusetts, though the written law spoke only of debts: *Lothrop v. Reed*, 13 Allen, 294. Our statute expressly provides for unliquidated damages: Rev. Sts. § 5067. I have had a few cases under this clause, but none which required a written judgment, and I remember fully but one, which is referred to and stated in my opinion in *Ex parte Houghton*, 1 Lowell, 558. I have seen no report of any case elsewhere that will aid us.

It is now well settled that when one party to a contract definitely refuses to perform his part of it, even before the time of performance has arrived, the other party may have an action immediately; and, *a fortiori*, where after the execution of the agreement has been begun he refuses to complete it. The only doubt was whether the injured party could have an immediate and complete remedy, once for all, without tender of performance on his part, and the decision is, that he may: see *Beckham v. Drake*, 2 H. of L. Cas. 645; *Emmens v. Elderton*, 4 id. 624; *Cort v. Ambergate Railway Co.*, 17 Q. B. 127; *Hochster v. De la Tour*, 2 Ellis & B. 678; *Grove v. Donaldson*, 15 Penn. St. (3 Harris) 128; *Re Wheeler*, *ante*, p. 252. It is plain, therefore, that if the company had discharged the petitioner the day before the proceedings in bankruptcy were begun, he would have a claim for damages which he might prove. The cases I have had were of that precise character, and it has not been denied that they were correctly decided.

Does it make any difference that the company neglected to give the petitioner a formal dismissal? I think not. They did an act which incapacitated them from fulfilling their contract, and I deem it an unnecessary and false nicety to hold that, because this act was the very filing the petition in bankruptcy, therefore there was no breach at the time of the petition. It resembles

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very much the case of an owner of a periodical publication, who, having contracted for a series of articles by an approved writer, should sell his magazine while the contract was running: *Planché v. Colburn*, 8 Bing. 14; or of a man who, having promised to marry one woman, should marry another.

I hold that the contract was, *ipso facto*, dissolved by the filing of the petition in bankruptcy, which made its performance by the bankrupts impossible and by the petitioner illegal, for he had no right to employ a man or pay a dollar after that time; and that the fact that the bankrupt corporation did not, five minutes or more before such filing, formally dismiss the petitioner from their service is immaterial. It was argued that the contract was not dissolved, because the assignees might be authorized to carry on the business of the bankrupt for a period not exceeding nine months, with the assent of the court and of a certain portion of the creditors. But such an order, if passed, would not either continue or revive this contract; it would not require the assignees to employ the petitioner, unless they found it to be expedient, nor him to accept their employment. It would be a new engagement upon new terms. That the assignees consider the contract dissolved is plain, from their refusing to credit the petitioner the full amount of his salary, while he remained in charge of the works after the bankruptcy, saying that he must accept a *quantum meruit*, which is entirely just and sound.

One word as to the point that there is some contingency in this contract. I cannot see any. It is an absolute contract for employment for a determinate period at a fixed compensation. The clause in the statute, concerning the proof of contingent debts and liabilities, aids us to discover the general intent that debts may be proved, though not either due or payable at the day of the bankruptcy, but it has no other bearing, that I see, upon this case. The contingent liabilities that the courts have always refused to assess, are those in which it is uncertain whether there ever will be any thing to assess: *Riggin v. Magwire*, 15 Wall. 549. It is no objection to a proof that the court or a jury may find difficulty in assessing damages for a breach of an absolutely broken contract, any more than that there may be complications in an account; and so is the law of contingent debts, if the contin-

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gency happens before the close of the bankruptcy. If the liability is absolute, there is no more or less difficulty in liquidating it, and no less obligation to liquidate it in the court of bankruptcy than in any other.

I have examined the English decisions under the act of 1861, which was somewhat similar to ours, in permitting proof for damages arising by contract,¹ and they do certainly put a narrow construction upon the words, by holding that the contract must be express, and the breach must precede the adjudication in bankruptcy. I am not sure that they intended to say that it might not be contemporaneous with the adjudication. The legislature were dissatisfied with those decisions, and in the act of 1869 have explicitly declared that damages for breach of a contract, express or implied, may be proved, and this whether the breach is before or after adjudication: 32 & 33 Vict. ch. 71, § 31. I do not think that our statute will be found to need amendment in this respect. I do not expect to see it decided that damages for breach of an implied contract cannot be proved, and I doubt whether the time of breach will be so strictly confined as by the former English rule.

One item of the set-off is disputed, but the evidence does not enable me to pass upon it, and its decision will form part of the future adjustment or liquidation. The petitioner had \$500 in his hands, and sets it against so much of his salary. There is no doubt that he can do this under the mutual credit clause of the statute, unless the money was put into his hands by the treasurer, at a time and under circumstances that would make it a preference if applied to pay the salary. It was said to be a sort of trust fund, but I do not so understand it. The petitioner was in the habit of receiving and paying out moneys for various purposes, and any balance that he might happen to have at the time of bankruptcy would clearly be a subject to set-off, whether he were in the habit of paying his own salary or not. I suppose it would be so under the ordinary practice in Massachusetts, but it is clearly within the bankrupt act.

Petitioner has the right to prove for damages as well as for the note and any arrears of salary. If the mode of assessing damages is not agreed on by the parties, the case will go to a jury.

¹ 24 & 25 Vict. ch. 184, § 153.

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THE EUREKA.

JULY, 1875.

Whether the maritime law of the United States requires a master to communicate with his owners before giving a bottomry bond, *quære*? It has not yet been decided that a separate communication must be made with the owners of the cargo before including it in the hypothecation.

If a bottomry bond is given in good faith for necessary supplies, the objection of want of authority will only go to reduce the premium, so far as the ship is concerned, since by our law the ship is hypothecated without a bond, and a bad title will not merge a good one, in the absence of fraud.

Where the bond is taken by the agents of the ship, they may be bound to see to the application of the money.

Where the agents, taking a bond, advertised for bids, but gave a wholly insufficient notice, it was taken for granted that they feared a lower bid, and their premium was reduced.

Commissions paid the master by the bondholder are not to be included in the bond, though if the master has paid them to the owner, he is to repay them without interest.

Freight prepaid is not liable to the bottomry holder.

LOWELL, J. The principal objection taken to this hypothecation is that the master did not write sufficiently to the owners of the ship, and not at all to the owners of the cargo. Whether this objection is open upon the pleadings, is a serious question; but as the case was carefully argued upon its merits, I will decide them, without prejudice to the libellant's right to take this point in the appellate court, if my judgment could prejudice him in that respect.

The vessel put into Cape Town in distress, and leaking. Some of the damage had been caused by heavy weather, and as much or more by worms. The captain's letters to the managing owner show an intention of concealing from the underwriters the extent of that part of the damage for which they would not be responsible. Whether the owners have either rebuked or repudiated his conduct in this respect, I have no means of knowing, and I certainly shall not assume that they approved it; but, so far as communication goes, his letters to them appear to have been full and frank, unless in one particular, which I shall presently notice; and if communication is required by the law, they seem to have received it. Letters much less explicit were considered

sufficient in *The Gratitude*, 3 Rob. 240, and *The Bonaparte*, 8 Moore, P. C. 459.

This point of law is not settled by decisions in this country. In England, it has come to be the law, and is laid down as a general rule, that the master must communicate, if reasonably possible, with the owner of the ship, before hypothecating it; and separately and distinctly with the owners of the cargo, before he includes that in the security to the bondholder; and it would seem that the lender is bound to see that such communication is made. *The Oriental*, 7 Moore, P. C. 398; *The Bonaparte*, 8 id. 459; *The Hamburg*, 2 Moore, P. C. N. s. 289; *The Onward*, L. R. 4 Ad. & Eccl., 38, 57.

So far as the cargo is concerned, a judge whose learning in the foreign law is extensive has expressed the opinion that this doctrine, of which, however, he appears to approve as just, is peculiar to the jurisprudence of England: Sir R. Phillimore, in *The Karnak*, L. R. 2 Ad. & Eccl. 289. In a case which touched only the ship, the cargo not having been hypothecated, it was said by the Lord Chancellor of England, as late as 1847, that there was no law requiring the owner to be notified: *Glascott v. Lang*, 2 Phillips, 310; and Dr. Lushington took occasion to say more than once that he had been ignorant of any such law as to either ship or cargo, until instructed by his official superiors: *The Olivier*, Lush. 490; *The Hamburg*, 2 Moore, P. C. N. s. 304.

No such general rule has been adopted in the United States. By our law a master may hypothecate his vessel for supplies and repairs in any port out of his own State, and in the many cases in which this subject has been discussed not an intimation has been made that he must first consult his owners. This silence is conclusive of the question, because there has been scarcely a case of late years in which such notice might not have been readily given.

In this country, therefore, if notice is necessary, the want of it goes only to the validity of the maritime premium. See 1 Pars. Shipp. & Adm. p. 142; and how far this is to be invalidated will depend upon circumstances; because, as is pointed out by Pardessus, a bottomry bond, notwithstanding the premium, may sometimes be more beneficial for the ship-owner than the ordinary loan for necessities, which binds not only the ship, but also the

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owner, though the ship should not reach her home port: 3 Pard. Droit Com. No. 911.

That a bond taken in good faith and for an honest advance, but turning out to be invalid for some technical reason, will not destroy the tacit hypothecation, I hold to be well settled, notwithstanding that Mr. Justice Nelson, in delivering the opinion of the supreme court, reserved his opinion upon it; for, besides several decisions never overruled, it is a just rule adopted by all courts which are governed by equitable principles, and one of wide application, that a good title shall never merge in a bad one, excepting, of course, in cases of fraud: *The Hunter*, 1 Ware, 251; *The William & Emmeline*, Blatch. & How. 66; *The Virgin*, 8 Pet. 550, per Story, J.; and so in the law of France, 3 Pard. Droit Com. No. 911.

I am not acquainted with any decision or *dictum* in the courts of the United States that requires a direct and separate communication to be made with the owners of the cargo under any circumstances; but there are a few *dicta* and one decision in respect to the ship-owner. The decision is *The Circassian*, 3 Bened. 398. I do not say there is no such law, but, so far as the cargo is concerned, I shall reserve my opinion. And as to both I am prepared to say that there is no general rule which throws upon the bondholder the burden of either proving such notice or excusing the want of it. The *dicta* which I have referred to do not carry us far; but I think it has been generally admitted, or taken for granted, that as maritime interest should not be paid without necessity, therefore, if the master was in a position to ask for money from his owners, whether by mail or telegraph, and to obtain an answer immediately or without any injurious delay, he should write, before promising to pay a large premium. Thus Marshall, C. J., says the bond may be given "wherever the owner himself or his known or authorized agent could not be consulted, *without endangering or retarding the voyage.*" *Selden v. Hendrickson*, 1 Brock. 399. This saying resembles very closely, and perhaps not accidentally, the provision in the laws of Oleron, concerning the right and duty of the master to sell a part of his cargo in order to raise money for the necessities of the ship. "Certain merchants, or one," says this venerable code, "freighteth a ship and setteth

it in way. The said ship entereth into a haven, and is there so long that money faileth them. The master ought for to send in haste into his country for money, but he ought not to lose his time, for if he do he is bound to redress all the damages of the merchants. But he may take of the wine and of the merchants' goods, and make sale for his store," &c.: Laws of Oleron, art. 23, Black Book of Ad. vol. i. p. 119. It will be remembered that it was upon the power of the master to sell part of the goods that Lord Stowell chiefly relied, in admitting his power to hypothecate the whole, in his famous judgment in *The Gratitude*, 3 Rob. 240.

The first decision in England and the only one in the United States were made in cases where the master was in direct telegraphic communication with the ship-owner, and all that he need do, when the demand for a bottomry security was made upon him, was to ask instructions, which he could receive in a few hours: *The Oriental*, 7 Moore, P. C. 398; *The Circassian*, 3 Bened. 398. But it cannot be admitted that when the defendant has proved the time which the mail will take and the time the ship was detained, and that the latter exceeds the former, this burden is sustained, and the bondholder is put upon his defence. I do not understand that the English cases, rightly read, sustain any such notion; but some of the sayings of learned judges may seem to look in that direction.

In this case, no questions were asked, even in cross-examination, to develop the essential facts, upon which alone this point could be decided: such as, whether the delay was expected to be so long as it was; when the necessity of a bond was first apparent; under what dangers of loss a still greater delay for instructions would have brought the adventure; what was the supposed value of the vessel when repaired. And only at the trial, from witnesses who happened to be accessible, was any testimony given about the course of the mails, and the facilities at Cape Town for transshipment. Not a word is said about this matter in the pleadings; not a word is asked of the bondholder about it when his deposition is taken; and, in short, the elements for a just determination of the question have not been brought out. It appears to have been an after-thought.

Even in England the admiralty court appears to insist that a

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want of due communication should be specially pleaded ; though I am not sure whether the privy council agree in this : see *The Olivier*, Lush. 490 ; *Glascott v. Lang*, 2 Phill. 810 ; *The Bonaparte*, 8 Moore, P. C. 460. Taking the evidence exactly as it stands before me, and taking the captain's letters to be honest, which they seem to be, and laying aside all consideration of the burden of proof, the case does not appear to be one in which the master could well have waited for funds after he found out his need of more money than the sales of damaged cargo would supply : *The Staffordshire*, 25 Law Times, N. S. 137 ; 8 Moore, P. C. N. S. 443 ; L. R. 4 P. C. 194 ; *The Gratitude*, 3 Rob. 240. In the latter case, which is the great fountain of learning and suggestion on this subject, will be found many remarks applicable to the case at bar : see pp. 262 and 274. The learned judge sustained the bond upon the cargo under circumstances which strike me as far less favorable to the holder in this matter of communication than is that now before me. Here the mail took three months to go and return, and there is much reason to say that the master had no expectation of staying so long at Cape Town. In his letters he regrets, in terms which have every appearance of sincerity, that he is so distant as to be practically beyond the advice and assistance of his owners.

There is one piece of evidence, indeed, that might lead one to suspect that the master had held back information. The libellants, who transacted all the business with the master, say that already in May there was an arrangement for a bottomry bond. If this were so, I think the master ought to have informed the managing owner. But the master denies the fact. There may have been a misunderstanding between the parties ; or it may be that the agreement was conditional on a state of circumstances which the master thought would never happen, that is, that the repairs would exceed the value of the damaged sugar to be sold, and so the conversation escaped his recollection. I do not feel justified in finding fraud, which there must have been, if so important an agreement was purposely kept back.

Most of the contested cases in England have been cases about cargo, because the master almost always does inform his owners of all that happens to him ; and such notice is all that can usually be

required, and is equivalent in most cases to a demand for money; and an absence of such usual communication would be strong evidence of fraud. But as applied to the freighters, the doctrine is admitted to be peculiar to England, and believed by many learned judges there to be novel. I reserve my judgment upon it, except that, if it is understood that any rigid and arbitrary test of an agent's good faith and prudent action is likely to be adopted in the maritime law, I do not share that opinion.

The pleadings and evidence which I have already referred to make it unnecessary to dwell more upon the law. If the English cases were of authority here, they would not require this bond to be set aside.

Coming, then, to the items of the account, several objections are made.

1. To the premium for insuring the risk being included; and this is abandoned by the libellants.

2. To the amount of the charge for maritime interest. This charge is called fifteen per cent, but is in fact a little above twenty per cent, because the sum or principal upon which it is charged includes a charge for the bill of exchange, which was not accepted. It seems that the libellants, acting for the master, whose agents they were, advertised for money on bottomry; but they published the advertisement in the morning, and gave only until the same day at one o'clock in the afternoon for proposals. They appear to have acted on one of those supposed conventional rules that I have referred to, and to have thought that a publication was necessary, but might be merely formal. We must take them upon their own ground, and assume the notice to have been necessary or desirable; and from its inadequacy we ought to presume that a lower bid was feared, if time had been given to make one. Indeed, it is by no means clear that a lower offer was not made; but the evidence is somewhat obscure, and I do not rely upon it. I shall allow twelve per cent upon the advances actually made, which will amount to nearly fifteen, because the advances were partly by a loan of credit, entirely justifiable and proper, but which gave the libellants a further premium than that appearing on the face of the bond.

3. The captain received in money from the libellants £88, for discounts, which the libellants testify would have been allowed him for his own use by the several tradesmen, if he had

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settled his bills himself. This practice of agents procuring discounts on the bills of their principals is a most immoral one, but, unfortunately, very extensive and very persistent. The courts have discouraged it in vain. The master, however, swears that he has accounted for the money to his owners. If this is so, there is no reason, perhaps, in this particular case, why they should retain it, though they certainly ought not to pay interest and premium upon it. I understood the managing owner to say he had received only a part of it. He may prove by affidavit how much he has received in account, and for that he should be charged without interest.

4. £630 paid to the master. I think I ought to order a further examination of this item, both upon the law and the facts, if the claimants desire it. It was decided in *The Royal Stuart*, 2 Spinks, 258, cited at the argument, that an agent who takes a bond is bound to see to the application of the money borrowed, though an ordinary lender may accept the captain's assurance that it is wanted for the legitimate uses of the ship. I should wish further light upon the law, and, if it is as ruled in the case cited, as to the facts of this expenditure.

5. In marshalling the funds, it is claimed by the charterer that he should be repaid the sum of £271 8s. 9d., advanced by him at Java, on account of the freight. This is a valid demand by the law of England, and has been adopted in New York by the district and circuit courts: see *The John*, 3 W. Rob. 170; *The Catherine*, Swabey, 268; *The Salacia*, Lush. 578; *The Karnak*, 6 Moore, P. C. N. S. L. R. 186; 2 P. C. 545; *The Anastasia*, 1 Bened. 188, 201, *note*.

I ought to follow these precedents, unless fully satisfied that they are wrong, which I am not, by any means. This claim is therefore allowed.

Bond pronounced for, excepting as above stated. Further hearing upon the £630, if asked for by claimants within five days; otherwise, decree to be made up in conformity with this opinion.

F. Goodwin, for the libellants.

J. B. Richardson, for the ship-owners.

J. C. Dodge, for the owners of cargo.

C. W. Storey, for the charterers.

Ex parte Morris. — Re Foye.

Ex parte MORRIS. — Re FOYE.

August, 1875.

If a mortgage, pledge, or lien be given by a principal debtor to secure his surety, and both principal and surety become insolvent, the creditors, whose claims the surety is bound for, have an equity to require the mortgaged property to be applied to the discharge of their debts specifically.

This equity depends upon the equities between the parties to the mortgages, and if by negligence of the creditors the surety is discharged, or if the state of accounts between the parties is such that the surety has lost his lien, the creditors have no lien.

The creditors must first apply their security, and prove against either estate for the deficiency only.

If the holders of the claims secured by the mortgage to the surety prove in full, they waive their security.

Whether, if the estate of the surety will pay no dividend, the pledged property should not be surrendered to the assignee of the principal, *quæres*?

DOCTRINE OF EX PARTE WARING.¹— In June, 1874, George F. Foye mortgaged his stock and fixtures to his brother, John W. Foye, to secure him for all liabilities he had assumed or might assume for the mortgagor. Within a few months both parties became bankrupt, and the petitioner was chosen assignee of both estates. He realized about \$9,000 from the sale of the mortgaged property, and nothing of importance from any other assets in either case. Upon his petition, asking directions for the distribution of the assets, the register notified all creditors, and from his report and from the papers on file it appeared that John W. Foye had indorsed for his brother for more than \$15,000, all of which debt was outstanding, and formed the bulk of the indebtedness of both estates; that the creditors, holding the notes, had proved against both estates, and most of them had voted for the assignee; that none of them had appeared before him at the hearing of this petition; that one general creditor of George F. Foye had appeared and filed a brief, which was sent to the court.

The register reported that the money received for the stock and fixtures should be divided among the creditors of George F.

¹ The peculiar equity discussed in this case is known in England by the name of the leading case, *Ex parte Waring* (19 Ves. 845).

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Foye without distinction, because the holders of the notes had waived any equity they might have had, by proving in full, and voting under both bankruptcies; and because the assets of John W. Foye being insufficient to pay any dividend, his creditors had suffered and could suffer no injury from the indorsements, and therefore the mortgage had become inoperative.

LOWELL, J. It is well settled that if a mortgage, pledge, or lien is given by a principal debtor to secure his indorsee or other surety, and both become insolvent, the holders of the notes or other debts for which the surety is bound have an equity to require the property to be applied to the discharge of their debts specifically. Many of the American cases upon this subject are reviewed by the late Judge Hall in *Jaycox's Case*, 8 N. B. R. 241, and by the learned American editors in 1 Lead. Cas. Eq. (ed. 1859) p. 163. The English decisions I have not seen fully collected, but have had occasion to examine them more than once. Some of the more important of them are *Ex parte Waring*, reported in three places, 19 Ves. 345, 2 Rose, 182, 2 Glyn & J. 404; *Powles v. Hargreaves*, 3 DeGex, M. & G. 480; *Ex parte Carrick*, 2 DeGex & J. 208; *Ex parte Copeland*, 3 Dea. & Ch. 199; *Ex parte Prescott*, id. 218; *Inman v. Clare*, Johns. Eq. 769; *Bank of Ireland v. Perry*, L. R. 7 Exch. 14; *City Bank v. Luckie*, L. R. 5 Ch. 773; *Ex parte Dewhurst*, L. R. 8 Ch. 965.

Under all these decisions, in both countries, the holders of the notes would *prima facie* have the equity which I have referred to. But this equity is obtained by subrogation, and depends upon the equities between the parties to the mortgage. Thus it has been held that if the surety has been discharged by the negligence of the creditors, or if the state of the accounts between the parties is such that the surety has lost his lien, the creditors have no equity: *Hopewell v. Bank of Cumberland*, 10 Leigh, 206; *Bibb v. Martin*, 14 Smedes & M. 87; *Vaughan v. Halliday*, L. R. 9 Ch. 561; *Ex parte Parr*, Buck, 191.

It is further settled that the creditors must work out their equity, and apply their security so as to prove against either estate for the deficiency only: *New Bedford Inst. v. Fairhaven Bank*, 9 Allen, 175; *Jaycox's Case*, 8 N. B. R. 241, per Hall, J.; *Powles v. Hargreaves*, 3 Mont., D. & DeG. 576; *Banner v. John-*

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ston, L. R. 5 H. L. 137 ; *Ex parte Joint-Stock Disc. Co.*, L. R. 19 Eq. 1, and L. R. 10 Ch. 198. There are many other cases, but none opposed to these. The reason is, that the equity is primarily that of the two estates, and the general creditors of each have a right to say that the security shall be applied before the debt is proved. Indeed, the decision of *Ex parte Waring* was put wholly upon the equities of the two estates, and several judges since have said that the secured or *quasi* secured creditors have no equity of their own ; but this distinction has not been found useful, as the courts are bound to apply the equity, whoever may ask for the application, and they have found themselves obliged to apply it, in many of the cases, upon the petition of the secured creditors.

It results from this rule, that if the holders of the notes, or other privileged debts, prove in full, they waive their security : *New Bedford Inst. v. Fairhaven Bank*, 9 Allen, 175 ; *Jaycox's Case*, 8 N. B. R. 241, per Hall, J. I desire, however, to make one or two remarks on those cases. In *Jaycox's Case*, Judge Hall said, very justly, that if the holders of the secured notes proved in full against the estate of the bankrupt principal, without the consent of the solvent surety, they would thereby release the surety to the extent of the value of the security, and at the same time abandon the security for the benefit of the estate of the principal. He had also said that the assent of the surety, or the fact that he was bankrupt, would probably make no difference, as it clearly would not, because the general creditors of the principal have a right to insist that full proof shall not be made against the principal's estate, except upon waiver of the security for their benefit. He, however, permitted the proofs in full against that estate to stand, apparently upon the ground that the resulting rights of the parties might be settled in another action, which is technically sound ; but the bankrupt court has undoubted power, and it would sometimes be its duty to see that the property was actually surrendered, at least before dividends are paid upon the proofs. A court of law, in an action arising out of the very case before Judge Hall, refused to give the surety the benefit of such a supposed release : *Merchants' Bank v. Comstock*, 55 N. Y. 24.

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In the case in 9 Allen, it was held, and very justly, that proof against both estates waived the security. The consequent equities were not considered, and no one appears to have asked for their determination. They would be that the surety's estate must surrender the security, and that the proofs against that estate must be reduced to the extent of the full value of the security.

In the present case, the proof having been made against both estates, the rule above indicated would be followed, but for the fact that there will be no dividend in the estate of John W. Foye, and therefore it is not worth while to go to the expense of reforming the proofs.

I am somewhat inclined to think the other reason given by the register for regarding the mortgage as valueless may be sound. The mortgage being for the indemnity of the surety, and the holders of the notes having no equity excepting through him, although it is perfectly clear that this equity does not depend on the surety's being personally damnified, or upon his having been damnified before his bankruptcy, yet I think it may be doubted whether the assignee of the principal has not a right to the security, when it is clear that no damage can possibly happen to the estate of the bankrupt surety. A doubt arises, on the other hand, from this consideration. Suppose the surety should not obtain his discharge, would he not have a right to say that the property ought to have been applied exclusively to his exoneration, and not to the general debts of his principal? This might be met, perhaps, by those creditors tendering him personally an indemnity, or, as they have a largely controlling voice in both bankruptcies, by procuring his discharge. It must be admitted, too, that the American decisions seem to regard the equity as a positive one, subject only to the rights of the surety.

I place my decision, therefore, upon the ground that the creditors have proved in full, and acted as general creditors of the estate of George F. Foye, the principal, and thereby have waived the security.

The assignee is to divide the proceeds of sale, pro rata, among all the creditors of George F. Foye.

The Mary Doane.

THE MARY DOANE.

SEPTEMBER, 1876.

It is the duty of a vessel on the port tack to clear a vessel on the starboard tack. In thick or foul weather it is especially the duty of a vessel on the port tack to exercise all possible vigilance and care; there should be some one on deck competent to give necessary orders instantly upon an emergency. Interest not allowed as damages when the bills of repairs had not been actually paid at the time the cause was tried.

COLLISION. — Libel for damage to the fishing-schooner Alice P. Higgins, by collision with the fishing-schooner Mary Doane, on the afternoon of June 17, 1874, on Nantucket Shoals. Both vessels were lying-to in a fog, with their helms hard down, and relying chiefly on their foresails; and the witnesses for each party testified that their vessel was making from two knots to two and a half knots. The libellants' vessel was on the starboard tack, and the Mary Doane on the port tack.

The case for the libellants was, that they discovered the Mary Doane at a considerable distance, estimated to be half a mile, about a point under their lee bow; that they blew a horn and shouted, but that nothing was done by the other schooner, excepting, perhaps, to haul aft the mainsail, and that the vessels came together near the bows, causing the damage described.

The respondents admitting the collision and the state of the wind, denied all negligence on their part, and asserted the fog to have been so dense that it was impossible for them to do any thing after the time that they discovered, or could have discovered, the Alice P. Higgins.

The Mary Doane had her helm lashed, and, when the master was called up by the lookout, he found he could not go astern of the libellants' schooner, and tried, by hauling aft his mainsail and letting go his jib, to bring his vessel up alongside the Higgins.

There was conflicting testimony upon the amount of fog, and as to certain admissions said to have been made by the master of the Mary Doane.

H. P. Harriman, for the libellants.

J. M. Day, for the claimants.

The Mary Doane.

LOWELL, J. It is not denied that the libellants complied with the statute in their use of the fog-horn, though the sound does not appear to have been heard on board the Mary Doane. It was argued that the vessel to leeward is, or may be, bound to give way, under the peculiar circumstances of such a case as this; but I cannot yield to this suggestion. The vessels were under way, though not in the ordinary mode of navigation in clear weather, and the vessel on the port tack was bound to give way. If the libellants had undertaken the responsibility of going to leeward, it would have been at their own risk, and would most probably have brought about a collision, if it had happened that they had been seen a little sooner. In this respect the case is like one of great importance, from the very large damages involved in it, which came up in this district a few years since, between two whaling-ships, which were lying-to in the Arctic Ocean in a gale, in which it was decided that the ship on the port tack was bound to clear the ship on the starboard tack.¹ This ruling was affirmed in the circuit court: *Brownell v. Swift*, 1 Holmes, 467.

The libellants, then, having the right of way, and having made such signals by fog-horns as they should have made, are the claimants excused by the state of the weather? Upon this point the evidence is not to be reconciled. In a matter where estimates and comparative statements are necessary, there is great opportunity for unconscious exaggeration on either side.

It is plain that in a fog of considerable density it was peculiarly the duty of a vessel on the port tack to exercise all possible vigilance and precaution; and the evidence shows that no one competent to navigate the Mary Doane was on her deck. When the young man on the lookout saw something under the lee bow, and had satisfied himself that it was a vessel, he ran aft and called the master from the cabin. To be sure, there was a man, and perhaps a good navigator, on deck, but it was not his watch, and he was doing nothing, and he disclaims all responsibility. Suppose this man, or any other person corresponding to the officers of a merchant vessel, to have been in charge, the boy would have notified him at once, when he first saw the object,

¹ *Ante*, p. 40.

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and would have had the benefit of his skill and experience, not only in handling the ship, but in ascertaining the nature of the danger. Where a ship was sailing before the wind in such a position that another ship approaching towards the bows could not be seen from the quarter-deck, Judge Sprague held that the lookout himself should have been a person competent to give the requisite order to the helmsman in case of meeting a ship: *Allen v. Mackay*, 1 Sprague, 219. So in this case there should have been some one on deck whose duty it was to give the necessary directions instantly.

Then, was the fog so dense that no reasonable amount of vigilance and preparation would have availed? I do not think so. Whatever deductions are to be made from the libellants' estimates of the distance at which they saw the *Mary Doane*, I think the preponderance of the evidence is, that they saw her some time before they were seen. And I consider it altogether probable that the time which the claimants might have had, if they had used their opportunities, would have been enough to enable them to keep off, and go under the stern of the *Alice P. Higgins*.

I must hold the defendant vessel responsible.

I find the aggregate of the bills of repairs produced at the trial to be \$197.80, and I award for detention \$60, making the total \$257.80 and costs.

I do not allow interest, because the largest bill, more than half the total, has not yet been paid. *Decree accordingly.*

Re P. C. DRISKO.

SEPTEMBER, 1876.

A bankrupt, who has not been discharged, or to whom a discharge has been refused, and who has contracted new debts, may file a new petition in bankruptcy.

Semble, that whenever an involuntary petition may be sustained, a voluntary petition may be.

Semble, that those who were creditors when the first petition was filed may prove their old debts against the assets in the new bankruptcy; and that a discharge

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under the new petition would apply only to new debts, and to such old debts as had been proved anew.

A discharge may be refused *nunc pro tunc* where the parties had neglected to have the order entered at the time the decision of the court was announced, but had acted on the theory that the order was in force.

SECOND BANKRUPTCY. — This was a voluntary petition for the benefit of the bankrupt act. A creditor having an attachment on mesne process upon the chattels of the bankrupt petitions that the proceedings may be stayed and annulled, on the ground that the bankrupt has before applied for the benefit of the act, in March, 1872, and that in February, 1875, his discharge was refused, by reason of certain frauds specified and proved against him. To this it was replied that Drisko had contracted new debts since the date of the former proceedings, and before his second petition was filed, amounting to more than \$300. The facts alleged on both sides were admitted to be true; and it was further agreed that the bankrupt had some property upon which these proceedings might operate, if they could be sustained, being in fact the same property which the objecting creditor had attached.

E. Avery & E. M. Johnson, for the objecting creditor, cited *Re Farrell*, 5 N. B. R. 125; *Re Thompson*, 58 Law Times, 399; *Re Sydney*, L. R. 10 Ch. 208; *Re Russell*, id. 255.

C. W. Eaton & S. K. Hamilton, for the bankrupt, cited *Fisher v. Currier*, 7 Met. 424; *Gilbert v. Hebard*, 8 id. 129.

LOWELL, J. A very interesting question is presented by this petition, which I understand is likely to be carried to the circuit court. I have thought it my duty, however, to consider it with as much attention as if my decision would be final.

It was twice decided in Massachusetts, that, when a discharge had been refused to a bankrupt or insolvent, he might yet apply again for the benefit of the statute, if he had contracted new debts sufficient in amount to give the court jurisdiction: *Fisher v. Currier*, 7 Met. 424; *Gilbert v. Hebard*, 8 id. 129.

In the former of these cases, the arguments on the one side and the other were given by Shaw, C. J., with his accustomed thoroughness, and the conclusion reached was that the policy of the

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law would be best subserved, and its true intent be met, by distributing newly acquired assets equally among the new creditors and such of the old creditors as chose to come in, and by permitting a discharge from the new debts. It was taken for granted that the decree of discharge could not operate upon debts which were proved or provable under the earlier bankruptcy, because as to these it was *res judicata* that the bankrupt was not entitled to it; and it was said that the discharge in the new proceedings must be limited in terms to the new debts, unless the old creditors, or some of them, elected to come in and share in the new assets. The reasoning of the chief justice and the decisions in those cases have proved satisfactory to the profession, I believe, and they are entirely so to my mind.

But there have been cited here some provisions of the bankrupt act, and some recent decisions in England, which are relied on to countervail the older arguments and decisions.

By sect. 5116 of the Revised Statutes, it is enacted that no person who has once been discharged and becomes bankrupt again upon his own petition, shall be entitled to a discharge, unless his estate is sufficient to pay seventy per cent of the debts proved, or unless three-fourths of his creditors assent; but a bankrupt who proves that he has paid all his old debts, or has been voluntarily released from them, may have a discharge as if he had not before been bankrupt. The argument from this section is, that it cannot be believed that congress intended to put a bankrupt, who had been refused his discharge for fraud, in a better condition than one who had received it for upright and honorable conduct; and, therefore, as no disability is imposed on one who becomes bankrupt a second time, not having received his discharge the first time, it is to be taken that congress intended that such a person should not become bankrupt at all. This construction appears to me to stretch an inference beyond its legitimate bearing. The insolvent law of Massachusetts, from which so much of the bankrupt law was taken, had a provision somewhat similar to that of sect. 5116, but applied it to all second insolvencies, and not merely to those where there had been a discharge, nor to voluntary cases. It seems probable that the idea in the mind of the framers of the bankrupt law in thus

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modifying the insolvent law was, that a man who had never been discharged had never had the full benefit of the statute. They overlooked, perhaps, the question of fraud, and said a man may be bankrupt a second time, whose first bankruptcy was compromised or dismissed for one reason or another, or who neglected to apply for his discharge in due season. That there may be such cases is shown by the authority cited by counsel: *Re Farrell*, 5 N. B. R. 125.

It would have been easy to say that no one whose discharge had been refused for cause should again become bankrupt, and that the decisions in Massachusetts should not be applicable, if such had been the intent; and as there is nothing in any part of the statute to prevent a man becoming bankrupt a second time, and many implications that he may, I think it a sounder construction to hold that this particular case was overlooked, than that a prohibition against all bankruptcy by a person once refused his discharge should be inferred from a section which says nothing whatever about that class of cases.

It was admitted at the argument that a man may be made bankrupt a second time by his creditors, if he has committed new acts of bankruptcy, and has newly acquired property on which the proceedings may operate. Now, under our system, a voluntary petition is an act of bankruptcy; and I have repeatedly held, and it is the foundation of an ordinary practice in this court, that, after such a petition has been filed, any creditor may carry on the proceedings, if the debtor fails or neglects to do so. None of the able members of this bar practising in bankruptcy have ever objected to this practice, and most of them have availed themselves of it.

Indeed, I look upon it as a fundamental and most important part of our system, that although the mere fact of insolvency is not enough to authorize proceedings *in invitum*, yet if the debtor admits by a solemn act in court that he is hopelessly insolvent, the system takes effect, and his assets are to be equally divided. I am inclined to think that there is no case in which an involuntary petition may be maintained against any one in which a voluntary petition by him will not be. It is true that acts of bankruptcy may be committed by a solvent person; but when a

person solemnly in court admits his insolvency, no one can contradict him; and if he was solvent the moment before he filed his petition, he is insolvent the next moment.

The English system differs from ours in two respects, among others: 1. Excepting during the eight years that the statute of 1861 was in operation, no one has ever been permitted to become bankrupt on his own petition. Connected with this was the notion which runs through all the decisions, that the proceeding is to be begun solely for the benefit of the creditors. Bankruptcies concerted with the debtor have been repeatedly set aside in England. It has been held that a creditor ought not to begin proceedings unless there are assets to distribute. The mere discharge of the debtor is not ground enough for a bankruptcy.

2. The property of a bankrupt who had not received his discharge belonged to his assignees, to the end of the bankrupt's life, and consequently a second bankruptcy was void at law, and would be enjoined in equity, unless the assignees under the first bankruptcy had estopped themselves by their acquiescence in the debtor's contracting new debts on the faith of new property. This doctrine has been a good deal modified by the statute of 1869; but even now the bankrupt can acquire no property until his discharge or the close of the first bankruptcy, and not then unless certain conditions are fulfilled.

It will be seen at a glance that our law is much more favorable to the debtor, and encourages proceedings by him for his own benefit as well as for the distribution of his property; and his future earnings and acquisitions are his own from the time of filing the petition. Examined in the light of these marked differences between the English statute and ours, the cases cited will be found to support rather than to shake the conclusion to which I have come. Under the statute of 1869 the debtor may propose a liquidation by arrangement, which has many of the features of our voluntary bankruptcy, but leaves more power with the creditors, and is not bankruptcy unless the creditors choose. But so far as the property goes, it resembles bankruptcy; and, if the liquidation is not closed, the property will all belong to the trustee, whether newly acquired or not, unless the creditors vote a discharge. Under this law, it was held in the cases cited, that

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while one composition remained unsatisfied, a new one could not be upheld, even though it brought in new creditors or new property, unless this property had been released by the old creditors, and in that case it might be the subject of a new arrangement.

Our statute itself releases after-acquired property from the operation of the old proceedings. When, therefore, the cases cited decide that newly-acquired property, which is not subject to the old liquidation, may be the subject of a new one, they decide the point in the same way, *mutatis mutandis*, as the courts of Massachusetts decided it.

It is true that by our law the new property remains liable to process if the debtor does not receive his discharge; but this is not at all the liability of the English law. With us it remains liable to ordinary process by any creditors, old or new, who may be in a situation to attach or levy; while in England, in unfinished bankruptcies, it remains solely the property of the old creditors represented by the assignee. With us, when there are new debts and new assets, there are the same reasons for a second bankruptcy that there were for the first; while in England the second can have no operation until the close of the first, however long it may be kept open, or until a discharge is granted, whatever may happen in the mean time.

Which system is better in itself I do not say; but probably each may be the fitter for the country in which it obtains. Our system undoubtedly leads to second bankruptcies, but it has been found to work well, and is more just to the new creditors, while not unjust to the others.

I have thus far assumed the truth of the facts admitted by the parties, but I now find, on examining the record and my notes, that the discharge of Drisko was never formally refused. A hearing was had, and it was proved that all, or nearly all, the creditors, excepting the firm now opposing the petition, had been paid, but that a fraud has been committed with the intent to prevent these very creditors from recovering their debt; and it was intimated by me that Drisko was not entitled to his discharge; upon which the parties agreed to try the case pending between them in the State court, as if the bankrupt could not

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receive his discharge. No one ever asked me to enter an order refusing the discharge. Under these circumstances, I doubt whether this case should be permitted to proceed until the old case is disposed of.

Upon hearing the parties again as to this last point, I find that the case which was pending in the superior court of the State by these objecting creditors against Mr. Drisko proceeded to judgment as if his discharge had been refused ; and by the effect of that judgment these creditors hold the sureties on his bond, who would have been discharged if that judgment had not been obtained. It happens, unfortunately, that the sureties are now bankrupt, and these creditors have not obtained as much advantage as they expected, but they have all the legal results of the debtor's failure to obtain his discharge.

Under these circumstances, I think I am bound, at the bankrupt's request, to refuse the discharge in the former proceedings, *nunc pro tunc*, and then the petition to vacate will be dismissed, and it is

*So ordered.*¹

Re J. R. CURRIER.

OCTOBER, 1875.

The claim of a preferred creditor is not to be reckoned in determining whether or not the requisite proportion of creditors have joined in an involuntary petition.

A preferred creditor cannot prove his debt, or any part of it, until he has voluntarily or by compulsion surrendered his preference.

A mere repayment to the debtor, after a petition in bankruptcy is filed, cannot, for this purpose, take the place of a surrender to the assignee.

A preferred creditor cannot proceed for adjudication against his debtor for the act of preference to which he was a party, and therefore ought not to be reckoned in computing the number or amount of those who have or have not petitioned.

An involuntary petition must be signed by one-third in value of all the creditors, and by one-fourth in number of creditors whose debts exceed \$250 ; if there are none such, or if a sufficient number of them do not petition, the one-fourth in number may be made up from the smaller creditors.

It is not necessary that the larger creditors should refuse to sign ; it is enough that they do not sign.

LOWELL, J. In this petition for adjudication against the defendants, one act of bankruptcy alleged, and the only act relied

¹ Affirmed by the circuit court : see 14 N. B. R. 561.

on at the hearing, is a preference to T. Dana & Co., by a transfer to them, out of the ordinary course of the debtor's business, of the whole proceeds of his stock in trade, tools, &c., which, to be sure, amounted, after providing for a valid mortgage, to less than three hundred dollars, and which still left Dana & Co. large creditors of the defendant, for the balance of their running account. The questions for decision are, whether the transaction amounted to a preference which would be voidable by the assignee, and if so, whether the balance remaining due to Dana & Co. is to be reckoned in ascertaining whether the requisite amount of debt is represented by the petitioners.

1. It was hardly denied at the hearing that, upon the facts shown, the preference was one that could be avoided by the assignee, though, of course, that point will not be concluded by any decree made at this time.

2. It has been twice decided that the debt due a preferred creditor under such circumstances ought not to be reckoned in a proceeding of this sort: *Clinton v. Mayo*, 12 N. B. R. 39; *Re Israel*, id. 204. The original statute, re-enacted in Rev. Sts. § 5084, forbids proof by a preferred creditor unless he shall surrender his preference; and the surrender must be voluntary, that is, before final judgment against him for the amount of the preference. I speak of that statute as it has been construed in this court, and by what I consider the weight of authority. The new statute enacts that if the preference is set aside at the suit of the assignee, the creditor, in case of actual fraud, shall not be permitted to prove more than a moiety of his debt: Stat. 1874, ch. 390, § 12, 18 Stats. 181. This undoubtedly provides, by necessary intendment, that if there has been no actual fraud he may prove his whole debt, even after a recovery has been had against him for the preference; and if there has been fraud, one-half thereof. But it is nowhere said that if he has received a preference he may prove his debt, or any part of it, until he has either voluntarily or by compulsion surrendered his advantage.

I do not care to enter into any question whether a preferred creditor may at the first meeting surrender, or whether he must wait till the assignee is appointed.¹ There has been no offer of

¹ See *Re Saunders*, post, p. 444.

surrender here, nor any one to whom a surrender could be made. It is plain that a mere repayment to the debtor, after proceedings are begun, with intent, perhaps, to defeat them, cannot take the place of a surrender to the assignee.

It seems, then, that Dana & Co. are not creditors who could, under ordinary circumstances, vote at the first meeting, and I agree with the decisions above cited that they cannot be reckoned at this time. I will add one other consideration peculiar to this case. It has been repeatedly held in this court and elsewhere, that a preferred creditor has no standing in a court of bankruptcy to proceed for adjudication against his debtor for the very act to which the creditor has been a party. He is estopped on every principle of equity. It was once said by a late very learned and able judge, that where the preference consisted in merely suffering a judgment to be obtained in advance of other creditors, and a seizure on execution under such judgment, the creditor thus preferred might and ought at once to proceed in bankruptcy against the debtor. But the doctrine that there can be any such preference being now exploded, the *dictum* must go with it. There never has been a *decision*, and I apprehend will not soon be, that a conscious party to a fraud, though it be only a technical one, can take advantage of that fraud as foundation for a suit against the other party. I add, therefore, to the reasons already given why the debt of Dana & Co. should not be counted, that they ought not to join, and have no right to join, in this petition. In this case the ultimate purpose of the whole proceeding is to recover this preference; and though it turns out to be much less in amount than was supposed, yet the principle is the same. It cannot be that the assent of the very creditor indirectly proceeded against is necessary.

A brief has been submitted to me upon another point which was ruled at the trial, and, as I supposed, settled at that time. The petitioners are one-fourth in number of the creditors whose debts exceed \$250, and indeed of all the creditors, and they represent one-third in amount of all the provable debts, excluding Dana & Co., but they do not represent one-third in amount of the debts exceeding \$250, if they alone are to be regarded. In other words, though they hold more than one-third of all the

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presently provable debts exhibited by the debtor in his list, they do not hold one-third of those that are above \$250. And the defendant insists that where there are such creditors, they alone are to be regarded, unless upon notice and request they have refused or neglected to join. He cites the latter part of sect. 12 of the act of 1874, which says that, in computing the number of creditors who shall join, those whose debts do not exceed \$250 shall not be reckoned : 18 Stats. 181.

Judge Blatchford has decided that the word "number" in this clause is to be construed "number and amount:" *Re Hymes*, 10 N. B. R. 433. Judge Brown has held that "number" means "number:" *Re Hadley*, 12 id. 366. My impression is that the latter decision is to be preferred. It seems to me that congress intended to say to petitioning creditors: If you obtain one-third of all the debts, it shall be enough if you have one-fourth in number of the larger creditors. But if there are no such creditors, or if they do not petition, you may make up the number from the smaller creditors. This was to provide, I apprehend, for those cases, not very rare, where there is a great number of small debts, and to give the creditors the election of obtaining one-fourth in number of the chief creditors, or one-fourth of all, whichever they could, provided always one-third in amount of all the debts was represented in the petition. If this view is sound, the clause in question does not apply to the amount of debts to be represented, and this petition is sufficient.

I do not consider this point essential to the determination of this case, because I can see, by inspection of the petition and of the debtor's list, that the requisite number of the creditors holding debts above the specified amount have failed to sign the petition, which brings the case within one of the exceptions of the statute. It is argued that there should be allegation and proof that such creditors have been asked to sign and have refused, but I think the statute means that a failure to sign may arise from any cause, such as illness or absence. Any other construction would be dangerous and quite unnecessary, because a failure to sign is plainly shown by not signing. It was not intended that the larger creditors should be consulted at all events, but that the petitioning creditors should represent the requisite num-

Ex parte Balch. — Re Eliot Felting Mills.

ber and amount of all the creditors, or, if more convenient in the particular case, at least of the larger creditors, however reckoned. But a case is always made out when the due proportion of all the creditors has joined ; and the failure of the larger creditors to join is no defence. This petition is admitted to be good if those creditors had refused to join ; and how they are any worse off by neglecting than by refusing, I am unable to see. If they are favorable to the petition they sign it, or if they are opposed to it their signature is dispensed with, and the same result follows. The law was not intended to require a demand, when the acquiescence or the refusal could affect no rights in any way.

It is not without some significance that the rule of the supreme court, having the force of law, and governing the case of co-partners petitioning to put themselves and other members of the firm into bankruptcy, says : If one or more members refuse to join, not fail to join. The difference in meaning is obvious, though the cases are not otherwise parallel. A partner ought always to have notice and an opportunity to assent to or to dispute his own bankruptcy ; but a creditor whose action either way will bring about the same result has no such interest.

Adjudication ordered.

C. P. Greenough, for the petitioners.

J. B. Richardson, for the defendant.

Ex parte BALCH. — Re ELIOT FELTING MILLS.

OCTOBER, 1875.

Company A. was promisor, and Company B. was indorser, of certain promissory notes.

Both companies became embarrassed, and Company A. agreed to sell all its property to C., who had been the treasurer of both companies, at any time within one year, when he should have paid all the debts of the company. Friends of C. subscribed money, and put it into the hands of D., as trustee, to enable him to buy up the notes of Company A. indorsed by Company B. *Held*, that the purchase of these notes by the trustee with the funds of the subscribers was not a payment of the notes.

A representation by the holder of a note to the indorser that the note has been paid, does not discharge the indorser, who has been duly notified, unless he has suffered some loss or injury by reason of the representation.

A contract by the holder of a note to give time to the maker must be a valid and enforceable contract, as against the holder, or it will not operate to discharge the indorser.

Ex parte Balch. — Re Eliot Felting Mills.

INDORSER OF NOTE. — TIME GIVEN PROMISOR. — F. V. Balch, trustee, offered proof against the assets of the Eliot Felting Mills, a bankrupt corporation, for the amount of three promissory notes of \$5,000 each, signed by the City Mills and indorsed by the bankrupt corporation. It was admitted that the City Mills were primarily liable, and that one of the notes had not been duly protested, and the proof upon that note was abandoned.

The questions upon the other two notes arose upon the following state of facts: S. M. Weld had been treasurer of both corporations, and both stopped payment, and Weld and the Eliot Mills went into bankruptcy. Afterwards the City Mills voted to sell all their property for the purpose of paying their debts, which were equal to about the supposed value of the property. Still later, viz., March 17, 1875, a vote of the stockholders was passed, recalling the order for a sale, and resolving to execute proper conveyances of all the property, which should be placed in the hands of Mr. Balch, as an escrow, to be delivered to Mr. Weld on his receiving his discharge in bankruptcy within one year from that date, provided he should elect, within one week after such discharge, to take the property, and should cause to be paid, or give a satisfactory guarantee against all the debts of the corporation, excepting one that was secured by mortgage. Weld was to run the mill in the mean time for cash, without subjecting the corporation to any liability, and, if he ultimately bought the property, was to have any profits earned in the interim. About ten days after this vote was passed a paper was drawn up, reciting that certain friends of Mr. Weld had raised \$25,000, to be lent him on his obtaining his discharge, and that it was desirable that the money should be applied at once to purchasing the debts of the City Mills, and agreeing that the money should be placed in the hands of Mr. Balch, to be applied to that purpose in such sums and at such times as Mr. Weld should direct, and that Weld should give his notes in exchange for the debts so purchased, and that Balch should hold the debts so purchased until Weld should obtain his discharge and give his notes for the several amounts. This agreement was signed by the several subscribers to the loan, including most of the stockholders and directors of the City Mills, with some others. Weld further

Ex parte Balch. — Re Eliot Felting Mills.

agreed by the same paper to devote his time to the superintendence of the business of the City Mills, with a view to purchasing the same under the vote above mentioned. Mr. Balch immediately bought these two notes, one of which was overdue and had been duly protested, and the other, coming due on the day of his purchase, he caused to be protested. On or about the 16th of April, 1875, the property of the City Mills was seriously damaged by a flood, and the project for a purchase by Mr. Weld was abandoned, and this corporation went into bankruptcy at or near the time the notes were bought by Mr. Balch. Mr. Weld informed one of the assignees of the Felting Company that they had been paid.

E. Merwin & W. P. Walley, for the assignees of the Eliot Felting Mills, contended :

1. That as against the indorsers this debt was paid by its purchase.

2. The holder is estopped by the representation made by Mr. Weld, the real party interested, that the notes had been paid.

3. Time was given to the City Mills, who were the principal debtors, and thereby the indorsers were discharged.

R. M. Morse, Jr., for the creditor.

LOWELL, J. Two of the three points are clearly against the objectors.

1. These notes have not been paid. The evidence clearly shows that they were bought and were to be held good, at least against the City Mills. Now, I admit that if a surety pays a note, it may often be a payment in his favor, and yet no payment as against him. In other words, the holder may still sue the maker upon the note, as trustee for the surety ; or the surety may often sue the maker himself. But if the note has been paid by the principal it is gone. In this case there has been no payment by either principal or surety. The money did not come from either, and the purchase did not affect the surety in any way unless his situation was afterwards changed by the act of the purchaser ; that is to say, unless the second or third point is good.

2. There is no estoppel, because that depends on an actual loss of something in the particular case ; and there is no evidence of such loss.

Ex parte Balch. — Re Eliot Felting Mills.

3. The third point does not depend upon damage in the individual case. If time has been given to the principal the surety is discharged, whether there has been damage or not.

To constitute the giving of time there must be a valid contract which a court would enforce in favor of the principal against the creditor. I think there is no such agreement in this case. By the vote, the City Mills agreed to wait for one week after Mr. Weld should obtain his discharge, or for one year, whichever event should first come about, before disposing of their property excepting to him. He undertook nothing.

To the agreement between Mr. Weld and the subscribers to the loan the City Mills were not a party, and there was no occasion for their becoming a party to it, for it does not bind the parties to it to do or forbear any thing in respect to the City Mills. It is *res inter alios*. The clause on which the assignees more particularly rely is that which says that the debts of the City Mills shall be held by Mr. Balch, for the benefit of the subscribers, until Mr. Weld obtains his discharge and gives his notes. This has nothing to do with suing or not suing the City Mills. It means that Balch is to hold for the subscribers until he holds for Weld, and is intended merely for the security of the former. But granting that it intends that Balch should hold the very notes that he receives, still, if he should sue them, the City Mills would have no equity to prevent him. A breach of his trust, in this respect, would be nothing to them.

Besides, I have no doubt that the true construction of the vote of March 17 is that Weld might at any moment after the vote was passed, whether before or after he obtained his discharge in bankruptcy, make up his mind and notify the corporation that he should not, under any circumstances, take the property. If this be so, there is nothing in the second paper to vary it. So that even if we grant that there was an implied agreement that Weld, buying the debts, should not sue them until he had determined not to buy the property, that merely amounts to an undertaking that he would not sue until he chose to sue, which, I apprehend, would be no answer or ground of action against him, because the very fact of his suing would conclusively prove and determine his election.

Debt admitted to proof.

Re Saunders.

Re W. A. SAUNDERS.

NOVEMBER, 1875.

- A creditor who has never accepted a deed of trust made to a third person the enforcement of which would give him a preference, and who disclaims all interest in it, may prove his claim as unsecured.
- A preferred creditor may surrender his preference at the first meeting, and vote for assignee, when the preference is of such a nature as to be effectually destroyed by such a surrender.
- A mere agent to prove a note in bankruptcy, must prove it in the name and in behalf of his principal, if proof in his own name is objected to.
- A proof of debt, in the mode required by statute, establishes a *prima facie* case, even under objection, and subject to counter proof, or to an order of court for further proof, without producing such evidence of handwriting, &c., as would be necessary in the trial of an action.

PROOF OF DEBT BY SECURED CREDITOR. — W. A. Saunders, having land standing in the name of his brother, and being deeply in debt, procured his brother to convey the land to A. E. Johonnot and R. E. Demmon in trust to pay certain notes mentioned in a schedule annexed to the deed. One creditor to a considerable amount held several notes not specified in the schedule. The deed was recorded, and just before the end of two months from its date, Mr. Huntington, the creditor before mentioned, and certain others, filed a petition in bankruptcy against W. A. Saunders, relying, among other things, upon this deed as an act of bankruptcy; and bankruptcy was adjudged.

At the first meeting, Huntington objected to the proof of the notes secured by the trust deed; Johonnot, one of the trustees, testified that only one of the holders of the notes had been asked to assent to it, and he had peremptorily refused. The several holders gave evidence that they had never acceded to the deed in any way, and most of them had never heard of it. They all filed, as part of their affidavits of debt, a disclaimer of any interest under the deed.

On the other side, three notes, held by Fairbank, Gill, and Fish, respectively, were objected to, on the ground that they were procured for the purpose of influencing the proceedings in bankruptcy. The evidence was, that Huntington, fearing that he

Re Saunders.

should not be able to procure one-fourth in number and one-third in amount of creditors to join in his petition for adjudication, had applied to these three persons, to whom he owed debts, and asked each of them to receive a note of Saunders as collateral security. This they all did, and immediately, at the request of Huntington, signed the petition for adjudication.

One of the notes offered for proof by a creditor was indorsed by the bankrupt, and objection was made at the hearing before the court that no evidence of its protest had been given.

G. W. Park, for Huntington.

M. Storey, for creditors under the indenture.

LOWELL, J. The petitioning creditor, Mr. Huntington, was placed in a difficult position. He found on the records a deed of trust for the bankrupt's creditors, from which his notes appeared to be studiously omitted; and while he held debts sufficient in amount to enable him to make his debtor a bankrupt, and thus to avoid this preference, he could not multiply himself to make up the number now somewhat oppressively required by the statute. The case illustrates the serious obstacles which congress has lately interposed to shield a fraudulent debtor.

The courts, however, endeavoring to give the statute a reasonable construction, have held that creditors who have been preferred shall not count in estimating number or value, so that the petitioning creditor's arrangement to increase the number was perhaps unnecessary in this particular case. I have so held within a week past: *Re Currier*, ante, p. 436.

When it comes to proof of debts at the first meeting, it turns out that the secured creditors all disclaim their security, and deny that they had ever accepted it. Now, although our law presumes the assent of creditors in such a case, in the absence of evidence to the contrary, yet there can be no doubt that they may dissent; and it would never do to permit a debtor to close the door of the first meeting against some of his creditors by giving them security behind their backs, and holding them to a presumed consent which they have never given. The opposing creditor suspects that these gentlemen might have taken up a different position if the two months had run out before a petition was filed. But I must decide by the sworn evidence, which

Re Saunders.

gives no countenance to such a suspicion. Upon the evidence these creditors are neither secured nor preferred.

The case of *Johonnot* himself is different. He was at once a creditor and a trustee, and by receiving delivery of the deed as trustee without qualification, he assented to it as creditor. He swears not only that the deed was never acted on, but that it was abandoned before the petition was filed. Under these circumstances, I think he should be permitted to prove, even at the first meeting, upon making and delivering to the register for the use of the assignee, when appointed, a deed of the lands included in the conveyance.

I have before decided, for reasons satisfactory to my own mind, that security may, in many cases, be renounced and surrendered by a creditor at the first meeting. I am aware that there have been decisions to the contrary, founded upon the words of the statute, which says a surrender may be made to the assignee. But since a creditor, by proving his debt, *ipso facto* surrenders his security, and since a vote at the first meeting is often of much more importance than a piece of worthless security, I am not prepared to admit that a creditor who wishes to exercise this right is precluded by the permissive language of the statute, authorizing him to release to an assignee what he conclusively abandons by the mere proof of his debt. To guard against misapprehension, I have always required that a positive surrender or release, or whatever else the case might require, should be made.

The second question is, whether the three notes held by Messrs. Fairbank, Fish, and Gill, respectively, can be voted on separately in the choice of an assignee. Notwithstanding the form that was gone through of handing these notes to their present holders as collateral security, I think the fair result of all the evidence is, that they are merely agents of Mr. Huntington; and while it is true as a general proposition that one who could sue a debt in his own name may prove it in his own name, yet I am of opinion that an agent holding negotiable paper, for the mere purpose of proof, cannot prove it, under objection, excepting in the name and for the benefit of the real owner: see *Ex parte Dreyfus*, 13 N. B. R. 43.¹

¹ *Ante*, p. 805.

The M. K. Rawley.

On the third point, I am of opinion that the holder of a note overdue, making due affidavit as required by the statute, makes out his *prima facie* case, subject to the discretion of the register and court to order further proof, and to the right of any creditor or person interested to offer counter proof. In a great many cases, perhaps in a majority, the creditor has no personal knowledge of the facts, and his affidavit would not be of the slightest value in any court of justice upon any issue involving those facts. But I never heard it suggested that a creditor is to be prepared or obliged, by the mere interposition of an objection, to produce such evidence as would be necessary at an ordinary trial of those facts. It is not too much to say that the bankrupt law would break down under the strain that such a necessity would put upon creditors.

Order accordingly.

THE M. K. RAWLEY.

DECEMBER, 1875.

A shipper of goods has the right to have the bill of lading made to his own order; and, if the master has been instructed by the charterers not to sign such a bill, his only alternative is to reject the goods. He is not entitled to keep the goods and refuse to give such a bill.

Though the vendor of goods may be bound by his contract with the vendee to ship them to the order of the vendee, the master of the ship chartered by the vendee must take the delivery in such manner as the shipper makes it, or reject the goods altogether.

Where a master made his bill of lading to the order of the shipper, and the shipper, by his possession of the bill, induced the owners and consignees of the goods to accept and pay a draft, *quare*, whether this acceptance and payment were made under compulsion, and whether the amount of the draft could be recovered of the master, even if he were not justified in signing a bill of lading in that form.

CHARTER-PARTY. — BILL OF LADING BY VENDOR. — This libel was filed by Messrs. Moseley, Wheelwright, & Co., of Boston, charterers of the schooner M. K. Rawley, against that vessel, for an alleged breach of the charter-party. The case for the libellants was, that they took up the schooner for a voyage from Port Royal, South Carolina, to Brunswick, Maine, and agreed to furnish a full cargo of hard pine lumber, at an agreed rate of freight;

The M. K. Rawley.

that the libellants were bound to furnish the lumber with despatch at Brunswick, and ordered the cargo of Mr. Hudgins, a manufacturer of lumber, in Charleston, at twenty dollars per thousand, free on board. They alleged that Hudgins, with whom they had a running account, was indebted to them for the full value of this cargo, or that they had advanced such value to him. Hudgins shipped a part of the lumber, and took a bill of lading to his own order, which he indorsed to a third person as security for a draft on the libellants for \$1,000; which the libellants accepted and paid.

Thereupon the libellants procured the brokers who had negotiated the charter to write a letter to the master, of which the material parts are these:—

“Your charterers, Messrs. Moseley, Wheelwright, & Co., wish us to write you not to sign any bill of lading, except it reads to Moseley, Wheelwright, & Co.; they do not want it to order. They say if the shipper will not furnish bill of lading to them, go off without one, and they will hold you harmless. They do not care to have you say that you are acting upon their advice.”

When the letter was received, most of the cargo had been delivered; but the second bill of lading had not been presented, and the master requested Hudgins to make it to the libellants, which he declined to do, and threatened the master that he would not let him leave the port unless he signed a bill of lading, as before; which the master then did. Then Hudgins telegraphed the libellants that he had procured a bill of lading to his own order, and should indorse it to some one else, unless the libellants would consent to accept a draft; they replied that they would accept to a moderate amount, and he drew for \$1,650, which they paid.

The damages sought to be recovered of the ship were the amount of the draft of \$1,650, which the libellants alleged that they were forced to accept and pay in order to obtain possession of the cargo; the bill of lading having been indorsed by Hudgins to a bank in Boston, as security for the draft.

The answer asserted the claimants' ignorance of the state of accounts between the shipper and the libellants, and averred that the master was bound and obliged to give the bill of lading in the form demanded by the shipper.

The M. K. Rawley.

It was understood that Hudgins denied that the state of the account was such that the cargo had been fully paid for; but for the purpose of a preliminary hearing it was admitted that the libellants' view of the account was the true one, the right being reserved to take evidence upon that point afterwards, if necessary.

J. C. Dodge, for the libellants.

I. T. Drew, for the claimants.

LOWELL, J. The libellants contend that the lumber was delivered to them when it was sent on board the ship which they had chartered to transport it. If this is so, their next point is sound, that the vendor had no right to revoke his acts and reassert a dominion which he had once parted with: *Ogle v. Atkinson*, 5 Taunt. 759; *Stanton v. Eager*, 16 Pick. 467; *Bolin v. Huffleagle*, 1 Rawle, 9.

A vendor, however, may make a conditional delivery, by which he does not divest himself of the control of the property, but makes the carrier his own agent: *Mitchel v. Ede*, 11 A. & E. 888; *Wait v. Baker*, 2 Exch. 1; *Ellershaw v. Magniac*, 6 id. 570, *note*. A delivery at the wharf is an incomplete act, ambiguous in itself, and to be explained by the vendor at the time, or before the shipment is finished. In this case the act was explained not only by what followed, but by what had gone before, because in shipping a former part of the same cargo the shipper had demanded and received a bill of lading in his own name.

The simplest mode of stating the rights of the parties is, that however strongly one may be bound to convey his property to another, the title does not pass until the owner chooses to pass it, or until a court of equity compels him to do so; and, therefore, if, against all reason and right, he insists on retaining the possession, until the transit is ended, he does retain it. The only alternative for the master in this case was to refuse to receive the goods on these terms. But this is not what the libellants wished, nor is their complaint that he failed to reject the cargo. They were not willing to pay dead freight; and therefore required him to do what he had no right to do, promising to hold him harmless. He had no right to receive the goods on any other terms than those on which they were offered: he must accept or reject. If Hudgins had been a mere agent to forward

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the goods, the libellants might have revoked his agency; but a vendor, even if paid, is not a mere agent.

The question has been lately decided in favor of the master in the court of exchequer in England, by two judges against one; and it seems to me that the opinion of the majority is sound, for the reasons already given. The case was a very hard one for the buyers of the goods, but the principles that must decide it were considered too strong for the equities of the case: *Kreeft v. Thompson*, L. R. 10 Ex. 274. In that case the master had not been notified by the charterers what sort of bill of lading he was expected to sign, further than the charter-party itself might inform him. But this is immaterial; because the decision turned upon the right of the shipper to dictate the terms upon which he would deliver his goods, which would be the same though the charterers themselves had been present. They could not have accepted in part and rejected in part.

But if we grant that the property had once passed to the charterers, can the master be held to pay as damages for delivering the bill of lading a sum of money which the libellants have paid to the shipper? The latter could not by obtaining such a document revest the property in himself, or transfer a good title to one claiming under him, even in good faith: *Ogle v. Atkinson*, 5 Taunt. 759; *Stanton v. Eager*, 16 Pick. 467; *Kreeft v. Thompson*, L. R. 10 Ex. 274. The bill of lading, then, would be waste paper as against the libellants, though it might give the shipper the means of deceiving others. Where, then, was the legal compulsion upon the libellants to accept the draft? If Hudgins had retained actual possession of the cargo, the payment would have been compulsory; but if he had only a paper title which was worthless, can it be so considered? A slight duress or obstruction might be enough, as between the party exacting the payment and him who makes it, to deprive the payment of its voluntary character, and to warrant an action of assumpsit to recover it back. The question is, whether a third person has not a somewhat different position; whether, if the master was wrong in giving this bill of lading, he should be held liable for damages which are not the legal and natural consequences of his act.

Those natural consequences would seem to be the possible

Re Jones.

injury to third persons, who should advance money on the bill of lading in ignorance of its invalidity ; and I am not at all prepared to say that a master might not be liable in tort, in some cases, for damage of that character. So far as the shipper is concerned, the master is presumed to know that his bill of lading cannot avail against the true owner, though for any expense or trouble to which the latter might be put to vindicate his title there might be a liability. None such were suffered in this case ; the libellants yielded to a demand which could not be enforced ; wisely, perhaps, but still not under a strict necessity. As, however, I consider the first point a clear one against the libellants, I do not decide this. *Libel dismissed with costs.*

Re OLIVER L. JONES.

DECEMBER, 1875.

It seems, that congress has not expressed the intent that a fraud, committed before the bankrupt act was passed, should be ground for refusing discharge.

A fraud at common law, or under the statutes of the State, may be objected to a discharge, if it was committed so recently that it would affect any of the creditors who can come in under the bankruptcy.

LOWELL, J. Jones was made a bankrupt in the district of Maine upon a petition of a creditor, and was there examined very fully. The proceedings were afterwards dismissed, and Jones came to Massachusetts, and, after his residence here had been long enough, filed a voluntary petition, which has been proceeded with, and objections to his discharge have been specified and argued.

It is thought by the objecting creditors that the dismissal of the former proceedings was made for the very purpose of getting rid of the objection that preferences had been made within four months of the petition in that case ; and it said that no notice was given to creditors of the proposed order to dismiss. If so, it must have been an accident ; for the law has always been, until lately, that a man once in bankruptcy cannot go out again without the consent of every creditor. The importance of that

Re Jones.

rule is shown by this case. Now, by the statute of 1874, proceedings may be dismissed with the written consent of the debtor, and not less than one-half of his creditors in number and amount, if, after notice to the other creditors, the court shall approve: 18 Stats. 182. But the court would not be likely to approve a dismissal, if its effect would be to obviate valid objections to the bankrupt's discharge.¹

As the case stands here, mere preferences cannot be set up in opposition to granting a discharge, which were given without regard to this bankruptcy, and more than six months before the petition.

The objecting creditors, however, allege that certain conveyances which were made by the bankrupt, and which are admitted to have been preferences, were likewise fraudulent conveyances, and as such may be objected to the discharge, though they were made long before the bankruptcy. It has been held that such a fraud, though committed before the bankrupt law was passed, may be availed of for this purpose.

There is no doubt of the power of congress to make the discharge dependent upon any conditions it chooses to establish; but I have always been of opinion that it has not expressed an intent that a fraud committed before the law was passed should be ground for refusing the discharge. That point is not important here. The true construction of the statute does seem to me to be that a fraud at common law, or under the statutes of the State, may be objected, if it was made at a time so recent that it would affect any of the creditors who can come in under the bankruptcy.

It appears to me, upon examination of the evidence here, that one at least of the conveyances proved to have been made by the bankrupt was not only a preference, but an actual fraud; that is to say, though there was the consideration of a debt, there was likewise an intent to conceal and withdraw the property from creditors, and not a simple and *bona fide* intent to pay

¹ I am informed by Judge Fox that the case in Maine had not been dismissed, and could not be, under his practice, without notice. If this had been proved, the whole proceedings here would have been quashed, since there can never, or very rarely, be two bankruptcy proceedings against the same person at the same time.

Re Wilson.

or secure the debt. In another of the transactions there was a secret reservation of a benefit to the debtor, if the property should be more than sufficient to pay the debt; and, though this did not prove to be so, the fraud was complete before the result was determined.

The legal effect of such evidence depends on Rev. Sts. § 5110, clause 5, under which, as I have intimated, a preference probably means, either one that would have been voidable by the assignee in this case, or at least one that was made in contemplation of this bankruptcy. But the fraudulent payment, conveyance, or loss by gaming do not appear to be thus limited, and seem to include all such payments, conveyances, and losses as have diminished the assets, which otherwise would have come to the assignee.

Discharge refused.

I. T. Drew, for the bankrupt.

W. J. Copeland, for the objecting creditors.

Re W. F. WILSON.

DECEMBER, 1875.

A proceeding in bankruptcy by a partner against his copartner is not an involuntary proceeding, within § 9, Stat. 1874, ch. 890, 18 Stats. 180.

Therefore, a partner, who is in bankruptcy upon the petition of his copartner, cannot obtain his discharge without the assent of creditors or the amount of assets required in voluntary proceedings.

BANKRUPT. — DISCHARGE. — *W. F. Wilson* was adjudged bankrupt upon the petition of one *Harrington*, alleging himself a partner with *Wilson*, and that the firm was insolvent. *Wilson* denied the partnership, and a jury trial was had, which resulted in a verdict for the petitioner. *Wilson* now applied for his discharge, but filed no assent of creditors, and had not paid a sufficient dividend to enable him to dispense with the assent, if any is required. A creditor objected on this ground, and alleged certain frauds besides.

E. Avery, for the bankrupt, cited Stat. 1874, ch. 890, § 9, 18 Stats. 180; *Re Penn*, 5 N. B. R. 80.

N. B. Bryant, for the creditor.

Re Wilson.

LOWELL, J. An able argument has been addressed to me, that sect. 9 of the new statute absolves the defendant from obtaining the consent of his creditors, on the ground that, *as to him*, the proceedings are compulsory.

It is true that this defendant did not consent to be adjudged bankrupt in connection with one whom he denied to be his copartner, and that rule 18 requires, in such cases, notice and other proceedings, including jury trial, if demanded, precisely as if the petition were by creditors; and that the discharge of each partner is separate and distinct from that of any other. Still I am of opinion that these are not involuntary or compulsory proceedings under sect. 9 of the act of 1874. That statute requires a considerable number of creditors to join in a petition, and, as has been pointed out by Judge Blatchford, precisely the number required to assent to the discharge of a voluntary bankrupt; so that the theory of the statute appears to be that those creditors who have chosen to put a person into bankruptcy against his will are presumed to assent to his discharge, if he has committed no actual fraud or misdemeanor against the meaning of the statutes. That presumed assent is not given when one partner petitions.

Again, creditors can only proceed for certain acts of bankruptcy; but a partner may petition on the ground that the firm is insolvent. Rule 18, indeed, seems to imply that a partner may allege acts of bankruptcy against the firm; but the statute speaks only of insolvency as the ground for a voluntary petition; or rather it says that partners may petition or be petitioned against like individuals; and an individual can only petition on the ground of his insolvency. I apprehend it would be very difficult to find any case in which a partner would not be estopped to petition for joint acts of bankruptcy. No such petition has ever been brought in this court.

If, then, partners are insolvent, either has a right to insist that the firm shall go into bankruptcy, and the statute does not even say the other shall be notified; but the court very wisely has adopted notice as a rule of practice to prevent fraud and surprise. If the insolvency is proved, the case is made out. No involuntary case, of the ordinary kind, can be made out by such

Re Whitney & Munson.

evidence. In truth, the verdict in such a case as this simply establishes that the recusant partner ought to have joined in the voluntary proceedings.

Then look at the consequences. One partner, disposed to do his whole duty by his creditors, brings the petition; the other resists it, and is rewarded by a gift of his discharge; or the partners put forward one to take the burden, and compensate him in some way for the risk; or they take in a partner for the very purpose of playing this part.

It was argued that the words "compulsory" and "involuntary" describe two classes of cases: one by creditors, and one by partners. But it is plain that the words are used throughout this statute as strict synonymes. See especially sect. 6, where "compulsory" is evidently so used. Upon the whole, I am satisfied that sect. 9 refers only to the ordinary case of petitions *in invitum*.

If this case should be taken to the circuit court, I wish it to be distinctly understood that I have not passed upon the allegations of fraud.

Discharge refused.

Re WHITNEY & MUNSON.

DECEMBER, 1875.

If the assent of a creditor to the discharge of a bankrupt is procured by a pecuniary consideration moving from a third person, with no conceivable motive but to benefit the debtor, the presumption is very strong that the payment was made in behalf of the bankrupt.

Where a creditor, whose debt, after being proved, had been bought for more than its value by the brother of one of a bankrupt firm, signed an assent to the discharge of both bankrupts, and there was a signature later than his, under circumstances which proved that the assent was influenced by the purchase, — *Held*, that the privity of the bankrupt to the fraud was immaterial, and the bankrupt's discharge was refused.

Where an assent to the discharge of two bankrupt partners was written on one piece of paper, and the signature of a creditor was procured by a pecuniary consideration in behalf of one bankrupt, — *Held*, that neither could be discharged.

LOWELL, J. The third specification of objection to the discharge of the bankrupts is, that they, or some person in their

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behalf, procured the assent of Reuben G. Morse, a creditor, to their discharge, by the payment of money. The evidence tended to show that the brother of one of the bankrupts bought the claim of Morse, which had been proved against the estate; that the name of Morse is signed to the assent after four others, and before the sixth and last. It appeared that the negotiation for the purchase of this debt was conducted like any other purchase, Morse asking \$300, and obtaining only \$200. Nothing was said about discharge, so far as the witnesses recollected, and it was not proved when the assent was given. The brother testified that he bought the debt for the chance of the dividend, that he had had no communication with the bankrupts before buying, and that afterwards his brother told him he did not want to hear any thing about it, lest fraud should be charged. I am satisfied, from the clear weight of the evidence, that no one of ordinary business capacity could have bought this debt with any expectation of a dividend exceeding \$200; for this, among other reasons, that he could probably have bought the whole assets for that price, instead of a rather small fraction thereof. Upon the whole, I feel justified in believing, though against the positive testimony of the purchaser, that he must have had some other end to attain than the receipt of a dividend; and none can be thought of but that which was attained.

By the English law, when the certificate of discharge required the assent of creditors, it was held to have been obtained by fraud, if any one, even without the knowledge of the bankrupt, paid money to induce a creditor to sign it: *Robson v. Calze*, Doug. 227; *Holland v. Palmer*, 1 Bos. & P. 95. Lord Eldon regretted that the law had gone to such a length as to make void a certificate obtained by inducements offered to a friend or enemy, without any privity on the part of the bankrupt, and when, as he said, the bankrupt perhaps would have abhorred such means of procuring it: *Ex parte Butt*, 10 Ves. 359; *Ex parte Hall*, 17 id. 62. And he is said to have permitted a bankrupt in one case to apply for his discharge anew: *Ex parte Harrison*, Buck, 227, *note*.

Our statute speaks of a consideration given "in behalf" of the bankrupt, and was perhaps intended to vary the strict rule to

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some extent. I have so held in one case,¹ which was, however, very unusual in its circumstances.

But I observed in that case that different considerations might arise when a signature of a creditor had been obtained by money and placed upon the paper in such a way that it might have influenced other creditors to sign. This has been always held to be in itself a fraud on creditors, independently of any clause in a statute, and without regard to who has done it: *Jackson v. Lomas*, 4 T. R. 166; *Leicester v. Rose*, 4 East, 372; *Daughlish v. Tennent*, L. R. 2 Q. B. 49; *Philips v. Dicus*, 15 East, 248.

There is, besides, this circumstance in the present case: that the payment was made by a friend, with no conceivable motive but to benefit the bankrupt. In such a state of things it would be unsafe not to have the presumption a very strong one, I will not say conclusive, that such a payment is made in the debtor's behalf. In many of the decided cases it has appeared that the consideration has moved from a friend or relative of the debtor, and it would be very easy, of course, to conceal the motive. If it were clearly proved, as in the case already referred to, that a distinct and intelligible motive had influenced the action of the third person, and that the debtor was ignorant of the action until after it had been committed, I am still of the opinion that the certificate ought not to be refused, unless other creditors may have been misled. I do not find that the debtors have made out such an exceptional case. I am obliged to say "debtors," because the paper was a joint one; and, though the claim was bought by the brother of only one of them, it operates to the advantage of both, and must be presumed to have been done in behalf of both.

Discharge refused.

R. M. Morse, Jr., for the opposing creditors.

N. B. Bryant, for the bankrupts.

¹ *Ex parte Briggs, ante*, p. 389.

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W. H. BRETT v. H. H. CARTER.

DECEMBER, 1875.

The question of fraud in a mortgage of chattels, which permits the mortgagor to retain possession of the chattels, and act as apparent owner, is one of fact for a jury to decide. Such a mortgage is not void upon its face by the law of Massachusetts, nor by the common law.

A mortgage of future additions to a stock of goods in a particular shop is a valid mortgage of such goods, as fast as they are put into the shop by the mortgagor.

MORTGAGE OF CHATTELS. — LEAVE TO SELL. — AFTER-ACQUIRED CHATTELS. — Bill in equity by the assignee in bankruptcy of one Osborne N. Sargent, against a mortgagee of the stock of stationery and other similar goods. It appeared that Sargent bought out the stock in trade of the defendant Carter, as carried on by him at a certain place, in November, 1874, and on the same day gave back a mortgage to secure the payment of the purchase-money by instalments, represented by promissory notes extending over a period of four years. The mortgage conveyed the stock "and any other goods which may from time to time, during the existence of this mortgage, be purchased by the grantor and put into said store to replace any part of said stock which may have been disposed of." Among the covenants was one, that, if the stock should be diminished "faster than said sum hereby secured is paid, said grantor is to furnish further security for said sum, whenever required by said grantee."

Two of the notes were duly paid, but one that came due in November, 1875, was not paid in full, and the defendant demanded further security, and a mortgage was given of such stock as had been acquired during the year. This mortgage was given about two weeks before the petition in bankruptcy was filed, and the theory of the bill was that it was a preference. The complainants afterwards asked leave to amend, and allege the first mortgage to be void, on the ground that the mortgagor was tacitly permitted to sell the goods in the ordinary course of his trade.

The defendant insisted that both mortgages were valid.

J. B. Richardson, for the plaintiff.

C. K. Fay, for the defendant.

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LOWELL, J. The court of appeals of New York decided, by a bench which was equally divided in opinion, that a mortgage of chattels which permits the mortgagor to continue in possession and to sell the goods in the ordinary course of business, is void on its face, as mere matter of law: *Griswold v. Sheldon*, 4 Comstock, 581. This decision has had a remarkable following, and its doctrine appears to have become the settled law of New York, Ohio, and Illinois. It is not the law of England, Maine, Massachusetts, Michigan, or Iowa; in several States it has not been passed upon. But as this new doctrine, or, rather, revival of an old one, has been said by Mr. Justice Davis, of the supreme court, to be so general and just that it may be presumed to be the law of Indiana, in the absence of express and unambiguous decisions of the courts of that State to the contrary, and as I venture to doubt both the generality and the justice of the doctrine, it becomes me, with all the respect I feel for that opinion, to state my reasons for not acceding to it. If the rule, whichever way it may be, were a settled rule of property in Massachusetts, inquiry into its history or justice would be unnecessary; but although I have no doubt my decision will accord with the law of Massachusetts, I have not found a case in this State in which the decisions in New York were reviewed, and it is possibly still a question for discussion.

I had supposed it to be well settled, — after much debate and conflict of opinion, certainly, but substantially settled, — that when a vendor or mortgagor was permitted to retain the possession and control of his goods and act as apparent owner, the question whether this was a fraud or not was one of fact for the jury, excepting under a peculiar clause of the bankrupt law of England. It is so pronounced by Mr. May, in his valuable treatise on Voluntary and Fraudulent Conveyances, p. 126, and by the cases he cites; and by the learned editors, both English and American, of Smith's Leading Cases, notes to *Twyne's Case*, vol. i. p. 1, &c. By the law of England, as I understand it, there are no constructive or artificial frauds, or, if the term is preferred, frauds in law, remaining, excepting, 1st, Such as are expressly made so by statute; as, for instance, when a bankrupt retains the order and disposition of goods, as apparent owner, with the consent of the

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true owner. We have not adopted this part of the bankrupt law, as was somewhat emphatically said in a late case in the supreme court: *Sawyer v. Turpin*, 91 U. S. (1 Otto) 114, 121; or, 2d, Where the act is necessarily a fraud on creditors; as where an insolvent person gives away a part of his estate for no valuable consideration, or the whole of it to one antecedent creditor. These, to be sure, are examples; but very few others could be adduced; and I understand the true law both here and in England to have been, until lately, that a conveyance for a valuable present consideration is never a fraud in law on the face of the deed, and, if fraud is alleged to exist, it must be proved as a fact; and that was the law even before registration was required for the benefit of persons dealing with the mortgagor.

It is very strange that after our legislatures have met the difficulties of *Twyne's Case*, by requiring registration, which gives not only constructive, but in most cases actual, notice of mortgages, and when many of them have provided that fraud shall be a question of fact for the jury, the decisions which I have cited, and others following them, should have reverted to the harsher doctrine which had already grown obsolete before the laws provided any notice at all, or any rule of evidence about fraud.

It is plain that such a doctrine virtually prevents a trader from mortgaging his stock at any time for any useful purpose; for if he cannot sell in the ordinary course of trade, or only as the trustee and agent of the mortgagee, he might as well give possession to the mortgagee at once and go out of business. In this case he never could have begun business, for the whole stock was supplied by the defendant.

I would refer in this connection to the very able opinions of Judge Dillon in *Hughes v. Cory*, 20 Iowa, 399, and of Judge Campbell in *Gay v. Bidwell*, 7 Mich. 519, in which they refuse to follow the decisions in New York, and give reasons for that refusal, which, in my judgment, are unanswerable.

If it be said that this is one of those cases in which fraud is a necessary result of the deed, all I can say is that this brings us to an ultimate fact of observation and experience; and I am unable to see the necessity. Indeed, it is much more difficult for me to see how creditors can be defrauded in such a case, when

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they are told in the deed itself that the debtor has no credit, and no property that he can call his own; than that the mortgagee is most outrageously defrauded by such a rule, which devotes his property to the payment of another person's old debts the very instant that he has parted with the possession, taking back a security which is admitted to be honestly given.

Take this very case as an illustration. It is admitted there was no fraud in fact; that the trader's whole stock was supplied by the defendant; that the mortgage shows that all the stock, present and future, is hypothecated, not as a cover or blind, for there was none, but to the payment of a certain debt by certain instalments. No offer is made to prove that any one was deceived, or even was ignorant of the mortgage; but I am asked to find fraud in law when I know, and it is admitted, there was none in fact. Besides cases already cited, see *Briggs v. Parkman*, 2 Met. 258; *Jones v. Huggeford*, 3 id. 515; *Barnard v. Eaton*, 2 Cush. 294; *Cobb v. Farr*, 16 Gray, 597; *Mitchell v. Winslow*, 2 Story, 630; *Abbott v. Goodwin*, 20 Maine, 408.

The second point in this case is no less interesting than the first. By the mortgage, the stock that shall be put into the shop by the mortgagor is included in the conveyance. It is undoubtedly the law of courts of equity, as cases presently to be cited will show, that after-acquired chattels definitely pointed out, as, for instance, by reference to the ship, mill, or place into which they are to be brought, may be lawfully assigned as security. The common law recognizes such transfers of land by way of estoppel, and of chattels when they are the produce of land or of chattels already owned by the transferrer, but not of future chattels *simpliciter*, unless there be some *novus actus interveniens*, after the chattels are acquired; that is to say, either some new transfer, or possession taken under the old. It may be cause of regret that the law should be different in the courts of common law and equity; but this is of no importance in bankruptcy, because it has been the law for a great while that an assignee in bankruptcy takes only the beneficial interest of the bankrupt; and the courts of law have admitted equitable defences, such as equitable liens, &c., to be set up in such cases, years before they had power by statute or usage to admit equitable pleas in ordinary contro-

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'versies; and it was every day's practice to find these courts passing upon equitable titles in behalf of a defendant, which they professed to know nothing about, and certainly could not deal with, if relied on by a plaintiff. Such was and is the law, and a very just law, as far as it goes.

But granting the rule in equity to be that after-acquired chattels may be mortgaged, the point which has given me most difficulty is, whether such is the law of Massachusetts. I suppose that the federal courts, in all matters of title to property, whether real or personal, when there is no question of commercial or maritime or general law, and none of the conflict of laws, are as much bound in equity as at common law by the jurisprudence of the State in which they sit. Or, in other words, I understand that the thirty-fourth section of the judiciary act, making the laws of the State the rule in actions at common law, is declaratory only, and that on both sides of this court I am bound to follow the law of Massachusetts in local questions, and the general law in general questions.

Now, the only decision I can find in equity, in this State, upon this subject, certainly decides very distinctly that even in equity a mortgage of after-acquired chattels is invalid: *Moody v. Wright*, 18 Met. 17. In that case the court refused to follow the then recent decision of Story, J., in *Mitchell v. Winslow*, 2 Story, 630, and relied largely on the *dictum* of a very distinguished judge, Baron Parke, who said, in *Mogg v. Baker*, 3 M. & W. 195, that there was no such lien in equity. Some years after these decisions were rendered, the house of lords unanimously followed the doctrine of Judge Story, and reversed a decision of Lord Campbell, which had been founded on the *dictum* already referred to; and Baron Parke concurred in the reversal: *Holroyd v. Marshall*, 10 H. of L. 191. This was not a new doctrine in courts of equity: see *Curtis v. Auber*, 1 Jac. & W. 532; *Re Ship Warre*, 8 Price, 269; *Langton v. Horton*, 1 Hare, 549; *Douglas v. Russell*, 4 Sim. 524; 1 Myl. & K. 428; *Re Howe*, 1 Paige, 129.

These cases have been repeatedly followed in England, and even more often in this country, and, so far as I am aware, with not a single decision the other way of late years. It is true that a great many of the cases arose upon mortgages given by railroad com-

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panies, and some few judges have founded a distinction upon that circumstance. But there is no difference in principle between the mortgage by such a corporation of its rolling-stock not yet *in esse*, and that by a trader of his future stock in trade in a particular shop. The truth merely is, that from the nature of the former, the large sums which they deal with, and the time at which they must be negotiated, which is before the road is finished, attention was called to the great injustice that would be done in displacing the first mortgage in favor either of general creditors or even of subsequent mortgagees; but similar injustice will be done in all such cases, to the extent of the value involved. The following are some of these decisions: *Holroyd v. Marshall*, 10 H. of L. 191; *Pennock v. Coe*, 23 How. 117; *Morrill v. Noyes*, 56 Maine, 458; *Pierce v. Emery*, 32 N. H. 484; *Benjamin v. Elmira R. R. Co.*, 49 Barb. 441; *Phila., &c. Co. v. Woelpper*, 64 Penn. St. (14 Smith) 366; *Phillips v. Winslow*, 18 B. Mon. 431; *Sillers v. Lester*, 48 Miss. 513; *Pierce v. Mil. R. R. Co.*, 24 Wis. 551.¹

Considering the decision by Judge Story in this circuit, and the reasons given by the court of Massachusetts for not following it, and the entire consistency of all the recent decisions with Judge Story's views, and the disappearance of Baron Parke's *dictum*, I am not prepared to say, that if the supreme judicial court were now asked to review their decision in *Moody v. Wright*, it is at all certain they would not reverse it, and under the circumstances I do not feel bound to hold that that case furnishes a settled rule of property which I must follow. So far from that, I believe that the law of Massachusetts in equity is that a mortgage of after-acquired chattels is valid.

I am of opinion that the mortgage of 1874 created a valid lien in behalf of the defendant upon the stock of goods in the shop at the time of the bankruptcy, and that the mortgage of 1875 does not vitiate this lien. The fixtures, however, which were not mentioned in the first mortgage, cannot be held by the second, because that was given after the bankrupt had become insolvent, to the knowledge of the defendant.

Decree accordingly.

¹ Mr. Justice Clifford has reaffirmed this doctrine in the circuit court for this district: *Barnard v. Nor. & Wor. R. R. Co.*, 14 N. B. R. 469.

The J. A. Brown.

THE J. A. BROWN.

MARCH, 1876.

The wages of the last voyage of a vessel have precedence of all earlier charges.

A person who pays the wages may be subrogated to the rank of the seamen.

A part owner may have such subrogation as against the mortgagee of the share of another part owner.

LOWELL, J. James Gammons, Jr., owner of ten-sixteenths of the bark J. A. Brown, which has been sold under a decree of this court, represents that he bought nine of his ten shares at an auction sale, made by the owner of the shares a few days before this libel was filed; that at the time of this sale a libel was pending in the court for the mate to recover his wages earned on the last voyage, of which the claimant was not aware; that he afterwards paid the wages and costs, and he asks to be subrogated to the privilege of the mate against the proceeds in the registry. This motion is resisted by the mortgagee of a part of the vessel. I informed counsel at the argument that I had decided some years since, in *The Tangier*,¹ that subrogation was often administered in the admiralty, and that the limitations attempted to be imposed on that doctrine in *The Larch*, 2 Curtis, C. C. 427, could not be sustained as law beyond the exact decision in that case.

When a vessel is unfortunately incumbered with liens and hypothecations of various kinds beyond her full value, the wages of the last voyage have precedence over all earlier charges, such as a bottomry bond given at the beginning of that voyage; and in such cases one who pays the wages is often subrogated to the rank of the seamen, on the ground that he has saved expense, and has given the seamen their money promptly, and only arrived at the result which the court would have reached. The owner, or part owner, is not excluded from the right of subrogation, when the justice of the case is with him, as for example, when the wages are not a personal debt of his own, or for any other reason he has equities as against the other parties. It has become the practice in England to require the person intending

¹ *Ante*, p. 7.

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to pay the wages to apply to the court in the first instance. Besides *The Tangier* above mentioned, I have allowed subrogation in some cases not strongly contested, I believe, certainly not reported. The following English cases may be referred to: *The William F. Safford*, Lush. 69; *The Kammerhevie*, 1 Hagg. 62; *The John Fehrman*, 11 Jurist, 112; *The Adolph*, 3 Hagg. 249; *The Janet Wilson*, Swabey, 261. I explained in *The Tangier* that the modern English practice is to require the person desiring subrogation to apply to the court before making the payment; but this is only a rule of practice, and is not strictly insisted on in all cases: *The Cornelia Henrietta*, L. R. 1 Ad. & Eccl. 51. It appears to me, on a consideration of the circumstances of this case, that I ought to give to the claimant the subrogation which I should undoubtedly have granted to the mortgagee if he had paid the wages. It may be said that he was paying his own debt; and he might be made liable, no doubt, for the whole wages, if the other owners were insolvent, as I suppose they were; but it appears that the freight was supposed to have been applied to the wages, and that there was enough for that purpose; but it was wrongly used by an agent, and Mr. Gammons was obliged to pay the whole, when in equity he was only liable for one-sixteenth. I do not see that, as between him and the mortgagee, he was bound to guarantee the solvency of his co-owners, or the due application of the freight. The mortgagee might have secured himself by taking possession of the vessel before her last voyage, or at any time before the freight was fully earned; but then he would have been liable for the wages. I find good ground, therefore, to say, that as to fifteen-sixteenths of the wages and taxable costs paid by Mr. Gammons, he ought to be subrogated to the right of the mate. It is understood, of course, that the petitioner is not attempting to compete with his own creditor. The debt secured by mortgage is not his debt.

Petition granted.

UNITED STATES v. JULIUS WITTIG.

MARCH, 1876.

A club or association of persons, not incorporated, combining together to promote social or literary objects, which delivers beer to its members, receiving checks in exchange for glasses of beer, having sold the checks originally to members of the club, is a dealer, under the statute, and liable to be taxed, under sect. 18 of ch. 36 of the statutes of 1875.

LOWELL, J. The question raised by the motion for a new trial is, whether a club or association of persons, not incorporated, combining together to promote social and literary objects, are to be considered a retail dealer or dealers in malt liquor under the circumstances proved at the trial, so as to be liable to an annual tax of twenty dollars, under ch. 36, § 18, of the statutes of 1875, vol. 18, p. 811. The club bought lager beer at wholesale, and the members of the club, and no others, were permitted to take beer at the rooms of the club, upon giving as many checks as they received glasses of beer. The checks cost the members five cents each, and the price was intended to cover the cost of the beer, though there was sometimes a small profit.

There seems to me to be no doubt that the club sells the beer to its members. Every element of a sale is present: the delivery of beer on the one part, and the payment on the other. It was argued that, at common law, a man cannot buy of himself and others. This is a mistake. The common law recognizes such a sale, though, if the contract is executory, the common law has no mode of enforcing it.

The true question is, whether such sales make the association a dealer under the statute. The question is one of much importance, from the number of such clubs throughout the country, many of whom, it is said, have conceded the point rather than undertake a contest with the United States. But I am not aware that it has been passed upon by any court.

If I am right in saying that the beer is sold by the club to its members, the club is within sect. 18, above referred to, and the question is, whether the generality of these words is to be

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restricted by a consideration of the subject-matter, or by the words of sect. 16, which speaks of the same persons as dealers and as those "who shall carry on the business," &c. If the question were merely whether the club carries on the business of beer-selling, there would seem to be great doubt; but sect. 18 appears to be intended to define such dealers with as much exactness as may be, and, if so, the ordinary definition of dealers, or persons carrying on a business, is of no importance. Take the case of distillers and brewers. They were originally defined as persons who distilled or brewed *for sale*: 12 Stats. 456; but these two words have been left out of all the later statutes, and it is conceded on all hands that a person who distils spirits or brews beer, though not for sale, carries on the business of a brewer or distiller; though, in ordinary speech, one who distils for his own use merely, would not be said to carry on the business of a distiller.

This is a revenue law, and the decisions of the supreme court require us to construe it liberally in favor of the revenue, to prevent evasions. So construed, I think it must be held that any course of selling, though to a restricted class of persons and without a view to profit, is within its meaning.

The only case cited at the argument, *Com. v. Smith*, 102 Mass. 144, was a decision under a highly penal statute, which creates an artificial nuisance when premises are used for the illegal sale of intoxicating liquors. The supreme judicial court in that case held that the judge at the trial had erred in ruling, as matter of law, that certain facts proved the defendant to be a seller, and that it should have been left to the jury to say whether he was so. The defendant was member and agent of a club; but the evidence was consistent with the possibility that the agent merely divided the liquors among the members in the precise proportions in which they had paid for those very liquors on their purchase from the importer. No such point is raised by the evidence in this case. The sales here were for checks which cost a certain sum of money, and it was not the intention of the club to divide its beer among those persons who bought it from the dealers. Besides, while I agree that every statute must be construed according to its intent, there is a certain amount of truth

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left in the old maxim, that penal statutes should be construed strictly; and it may be that a court ought to give the same word a more limited meaning in a statute intended to punish public immorality, than in one intended for raising revenue.

Upon the whole, therefore, I am of opinion that the verdict of guilty was well warranted by the facts, and that the motion for a new trial must be denied. *Motion denied.*

M. F. Dickinson, Jr., & J. Fox, for the defendants.

P. Cummings, for the United States.

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MARCH, 1876.

Attachments are not dissolved by the acceptance and recording of a resolution of composition.

All liens are preserved which are not expressly disposed of by the bankrupt act.

An attachment can be dissolved only by an assignment.

LOWELL, J. Objection has been made by three attaching creditors and by two deputy sheriffs that certain expenses of attachments of the debtor's property are not provided for by the resolution for composition. This objection might be a very important one in some cases. It would be very unjust that creditors should be bound to accept a certain amount of their debt and lose all their costs. It will, however, be soon enough to decide such a case when it arises. Here there has been no first meeting of creditors, no assignee chosen, and of course no assignment. It follows, as I have repeatedly decided, that attachments are not dissolved. My attention has lately been called to a decision of the court of appeals of Maryland, that an attachment less than four months old ought to be quashed after a composition has been duly accepted and recorded: *Miller v. Mackenzie*, 13 N. B. R. 496; and I think it due to that decision to give my reasons for the opposite opinion. It cannot be denied that all liens of every kind, legal, equitable, maritime, statutory, are preserved by the bankrupt law, and by every such law, unless expressly mentioned and disposed of by the statute. As early as the time of James I. the English law provided that neither attachments nor

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judgments should give the holders of them an advantage over the other creditors in bankruptcy, unless the lien of the judgments were perfected by seizure or levy on execution. The bankrupt act of 1841 split on this very rock, the highest court holding, in opposition to the able argument of Story, J., that attachments were all preserved: *Peck v. Jenness*, 7 How. 612. It is true that liens were expressly preserved by the act of 1841, and the decision of the supreme court was only required upon the definition of liens; but, as I have said, it is plain, and has been decided by every court that has had the question to consider, that liens are as carefully preserved by our present law as by any of its predecessors, excepting where positively affected by express words. The argument of the case I have cited is precisely that of Story, J., which the supreme court overruled, that the debt being gone, the security must go with it; and, logically followed, it cannot stop with attachments less than four months old, nor, indeed, with any other security. The true rule is, that, liens being preserved, the debt is preserved, so far as necessary *in rem*.

Now, there is nothing in the bankrupt law, including the sections which authorize a settlement by composition, that dissolves an attachment, excepting an assignment by the judge or register. Accordingly, it has been the practice here to call a first meeting, and have an assignee chosen, when it was found that there were attaching creditors who were not willing to come in. It seems almost a technical point, I agree, but there is no help for it; and there are, besides, some advantages in having an assignee to see that the composition is duly carried out. Where no such advantage would be derived, I have not found attaching creditors disposed to insist on obstructing the proceedings, provided their reasonable costs incurred in good faith are paid. In this case, the attaching creditors have the remedy in their own hands; for they can refuse to release their attachments until their costs are paid, and, indeed, their debts too, for that matter, unless they have in some mode released their attachments or estopped themselves. This state of things might be a reason for setting aside the resolution at the request of the other creditors; but as no one has asked for the order on that ground, and as I infer from the papers that the attaching creditors are ready to accept

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their share with the rest, if their costs are paid, I shall order the resolutions to be recorded, subject to be rescinded hereafter if it shall be necessary for the protection of the general creditors.

Resolutions to be recorded.

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MARCH, 1876.

Privileged creditors, whose claims will be paid in full, to the extent of fifty dollars, there being sufficient assets for the payment of them, should be permitted to vote for a composition only on the excess of their debts over fifty dollars.

BANKRUPTCY. — COMPOSITION. — The bankrupt offered fifteen per cent to his creditors, excepting those having priority ; and it appeared in evidence that a large number of the creditors who voted upon the question were privileged to the extent of fifty dollars for their wages as workmen of the bankrupt, and that the assets were ample to pay them in any event.

C. P. Gorely, for the objecting creditors.

T. F. Maguire, for the bankrupt.

LOWELL, J. A long examination was held by the register upon the questions of fact, and he has reported that the composition of fifteen per cent offered by the bankrupt is more than the creditors would be likely to receive in bankruptcy. This is denied by the opposing creditor. He likewise takes the point that the vote at the meeting and the confirmation of the resolution are irregular, because a large number of workmen having privileged debts exceeding in amount those of the ordinary creditors were permitted to vote and to sign, and have been reckoned in making up the requisite number and amount to pass and confirm the resolution, which provides for paying them in full, for which there are sufficient assets. The statute says that the value of the debts of secured creditors above the amount of such security shall be estimated ; and, again, that creditors whose debts are fully secured shall not vote or sign, without first relinquishing their security. Are the debts due the workmen fully secured to the extent of fifty dollars each, within this statute, when the assets are sufficient to pay them in full ? In my opinion, this question must

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be answered in the affirmative. No doubt the law refers chiefly to creditors having mortgages, pledges, and other security by contract upon specific property; but a case may easily be put where a large part of the creditors are secured by attachment of the debtor's property on *mesne process*. This is a security until the attachment is dissolved by an assignment in bankruptcy. There is nothing in the composition clauses to dissolve any such attachment, if the composition is offered before the first meeting of creditors in the case.¹ Shall these creditors be voters, when by the very composition their attachment is necessarily a security which will be preserved, and by bankruptcy it will be dissolved? I think not. So of the workmen. Although before the bankruptcy they have no security, yet in bankruptcy their claims are at once secured to them. The ordinary meaning of "secured" is, "made safe or sure;" and the law makes these debts so when there are assets enough for that purpose. It was suggested that these creditors might have an interest to promote an early settlement, and to obtain their money sooner than they would in bankruptcy. But there is no quicker way that I know of than that which the assignee is authorized and bound to take. He must convert the property into money, and pay the debts. It is the proper practice to pay the privileged debts as soon as money enough is realized. In this case fifty per cent has already been paid on these debts. It is obvious that such creditors have no real interest in the amount of dividend, which shall be voted to those who are less fortunate. Experience teaches us that workmen whose debts are safe are usually ready to vote in any way their employer may wish. A part of the operation of the law of composition is to enable a bankrupt to keep on in business without substantial interruption, and this adds greatly to the power of the employer. Besides, a bankrupt may make or unmake such creditors at his pleasure. He may pay any workman to whom he owes no more than fifty dollars, without being guilty of a preference, if there is enough for other creditors of that class. He may pay such as he finds are hostile to him, and retain a body of clients to vote for an assignee, or a composition, or what-

¹ *Re Clapp & Co., ante*, p. 468.

Ex parte Whiting. — Re Dow.

ever he desires. I have had occasion to say before now that I cannot deprive such creditors of their vote for assignee, if they choose to exercise it, because creditors having no actual security upon the bankrupt's property are by the statute permitted to vote. But it has been my practice, when the votes of workmen are brought in to make a majority in number, and they have caused a failure to elect, to give but little weight, in my appointment, to the votes of workmen, if it appears that the assets are enough to secure them in any event.¹ And this course has approved itself to the judgment of the profession here. I think these workmen have debts that are fully secured, within the usual meaning of those words, and within their just intent; and as they have taken a large, and, as I understand it, a preponderating part in the meeting and confirmation, I must refuse to record the resolution.

Leave to record refused.

Ex parte WHITING. — Re DOW & AL.

MARCH, 1876.

Where A. was a creditor of a bankrupt for two distinct debts, and held shares of stock in pledge for one of them, with a statutory power of sale existing at the date of the bankruptcy, — *Held*, he could apply the surplus proceeds of the shares, after paying the first debt, to the payment of the second.

BANKRUPTCY. — MUTUAL CREDIT. — Petition to prove against the joint estate and the separate estate of one of the partners such debt as should remain after applying the proceeds of certain collateral security.

LOWELL, J. The facts, as I understand them, are, that in 1874 the firm of Dow, Hunt, & Co., the bankrupts, of which firm A. C. Cushing was a partner, borrowed \$3,000 of a savings-bank, for which they, as a firm, and Cushing and the petitioner, Whiting, individually, gave their joint and several promissory note. This note the petitioner paid to the bank in full, after the failure of Dow, Hunt, & Co., but before their bankruptcy. The parties differ in their mode of looking at this note. The petition represents it as signed by Dow, Hunt, & Co., and Cushing, as principals,

¹ *Re Houghton, ante*, p. 328.

Ex parte Whiting. — Re Dow.

and by the petitioner as surety, while the answer represents it to be the note of Dow, Hunt, & Co. as principals, and Cushing and the petitioner as co-sureties, and alleges that the money went to the firm exclusively. Upon the face of the note I should suppose that the answer puts the contract correctly, and I shall so consider the case for the purposes of the present decision, though it is a point upon which evidence outside of the note is of course admissible. In 1875, the petitioner lent \$1,396 to the firm of Dow, Hunt, & Co., and Cushing transferred to him eight shares of the capital stock of the Hingham Steamboat Company as collateral security, which Whiting promised to return on payment of the \$1,396 with interest. This debt was overdue and unpaid at the time of the bankruptcy. This stock is worth more than \$1,396 and interest, and the assignee has offered to pay the amount of that debt upon a reconveyance of the stock. The question is, whether Mr. Whiting can hold the surplus proceeds of the shares by way of set-off against Cushing's other debt to him, for contribution as co-surety of the note above mentioned.

I have had occasion more than once to look carefully at the cases on the subject of mutual credit in bankruptcy; and while the decisions in this country agree entirely, as far as they go, with those made in England, the subject has been more fully considered in that country, as is natural, the bankrupt law having been in force there for a much greater length of time. The leading cases on the subject are *Rose v. Hart*, 8 Taunt. 499; *Young v. Bank of Bengal*, 1 Moore, P. C. 150, much more fully reported 1 Deacon, 622; *Naoroji v. Chartered Bank of India*, L. R. 3 C. P. 444; *Astley v. Gurney*, L. R. 4 C. P. (Ex. Ch.) 714. All those cases should be studied. The result of them is, that a creditor who, at the time of the bankruptcy, has in his hands goods or chattels of the bankrupt with a power of sale, or chuses in action with a power of collection, may sell those goods or collect those claims, and set them off against the debt the bankrupt owes him; and this, although the power to sell or to collect were revocable by the bankrupt before his bankruptcy; or, in other words, the occurrence of bankruptcy in such cases gives a sort of lien which did not exist before. This has been the law ever since *Rose v. Hart*, 8 Taunt. 499. Before that decision, it was

admitted even in cases where there was no power of sale. *Young v. Bank of Bengal*, *ubi supra*, adds this limitation, and this only, that if the right to sell the pledge does not arise until after the bankruptcy, then there is no set-off for the surplus; for the reason that the assignee might redeem instantly, before any such power existed, and the creditors shall not be prejudiced by any failure or neglect to redeem; or, to put it in another way, that the rights of the parties are fixed at the date of the bankruptcy.

I have not overlooked the fact that in *Young v. Bank of Bengal* a good deal is said about the agreement to return the surplus. In this case there is an agreement to return the shares when the debt is paid. I do not consider the case cited to stand on this ground, but on that already mentioned, that the credit did not exist at the date of the bankruptcy. See that case explained by Parke, B., one of the judges who decided it, in *Alsager v. Currie*, 12 M. & W. 751, and by the judges in the late cases above cited. I apprehend that, when shares are conveyed in this way as collateral security, the law implies a promise to return them on the payment of the debt, and its expression cannot properly affect the case. In all the cases there has been either an express or an implied promise by the agent or other person having the property, that he would faithfully account for it and pay over its proceeds; but this does not prevent a set-off in bankruptcy. And the weight of authority is that a promise of this sort does not bar a set-off, either under the ordinary statutes or under the bankrupt act, unless the property has been intrusted to the agent for a particular purpose inconsistent with such an application of the surplus, so that this would be a fraud or breach of trust: see *Key v. Flint*, 8 Taunt. 21; *Buchanan v. Findlay*, 9 B. & C. 738, for cases of this sort; and, for the general rule, *Cornforth v. Rivett*, 2 M. & S. 510; *Eland v. Carr*, 1 East, 375; *Atkinson v. Elliott*, 7 T. R. 378.

In this case, the debt of \$1,396 was overdue and unpaid, and by a statute of Massachusetts Mr. Whiting had a right to sell the shares after giving a certain notice. This law enters into the contract of the parties; and though there is no evidence of a power of sale conferred by Mr. Cushing (the form of the transfer was not put in evidence), yet they will be taken to have under-

Re Sawyer.

stood that there would be a power of sale in accordance with the statute. On the day of the bankruptcy, Cushing was indebted to the petitioner for one-half the note of the firm actually paid by his co-surety, the petitioner, two weeks or more before that time. This makes out a case of mutual credit upon the authorities cited and the others which have followed them: a debt due from Cushing to the petitioner, and choses in action of Cushing's, with a present power of sale in the petitioner's hands.

I understood that both parties submitted the matter to my decision, and accordingly I have decided it. It was said at the argument that the petitioner did not care to prove against Cushing's separate estate, as there could be no dividend. If so, it would not be necessary to decide the whole case now. When one partner has pledged his shares for the debt of the firm, proof may be made in full against the assets of the firm, because it is only when the proof is against the same estate which furnished the security that a sale and application of the security is required by the bankrupt law. *Petition granted.*

G. Putnam, Jr., for the petitioner.

W. B. Durant, for the assignee.

Re JAMES M. SAWYER.

MAY, 1876.

Where a creditor was paid to give up his threatened opposition to a composition,—
Held, the resolution was void, though a sufficient number of creditors had accepted it, and there was no evidence that their action was influenced by his, nor that the debtor himself procured the payment to be made.

So, where one who held the bankrupt's note was induced to sign the resolution by an expectation of advantage held out by the indorser, though what precise advantage was to be given did not appear, nor that the bankrupt had any thing to do with it.

A COMPOSITION offered in this case appeared to be duly accepted, and was recorded; and a few days afterwards a creditor petitioned to have the order for recording vacated, on the ground of fraud newly discovered by him. It appeared that one C. C. Farwell, who signed the confirmation, was asked to sign

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by an indorser of his note, who was active in procuring signatures, and that Farwell expected to obtain some advantage from this indorser if he should consent to sign, though he could not say what, nor why he expected it. There was no promise, and nothing was proved to be known by the bankrupt about it. Another creditor, who did not sign the composition, had expressed his intention to oppose it, and was paid something not to oppose; but there was no evidence that the bankrupt knew any thing of this payment, or that the money came or was to come from him.

B. E. Perry & S. W. Creech, Jr., for the objecting creditor.

C. Blodgett, for the bankrupt.

LOWELL, J. I have expressed my opinion upon the general subject of a secret advantage to one creditor, to induce him to assent to a discharge of a bankrupt, and as to the debtor's knowledge, &c., in the late case of *Whitney & Munson*,¹ which, I think, has been printed. It is vain to expect that privity in such a fraud shall be usually brought home to the debtor by direct evidence, and it must be, as it always has been, the rule, that he who has the advantage may be presumed to have had a part in obtaining it until the contrary is proved. The statute distinctly avoids a discharge obtained by means of a pecuniary consideration, given to a creditor with the debtor's privity; but the composition law is silent on this point, leaving us to general rules and principles; and it is a well-recognized rule of all courts that any compact between creditors compounding with a debtor is vitiated by any advantage given to one of them. There is no rule more universally acknowledged, and the statute rather limits than enlarges the scope of this doctrine, when it speaks of the debtor's privity.

Under the composition clauses my opinion is, that if a creditor is induced to vote or sign, by any means different from or beyond the composition, whether known to the debtor or not, his vote, so influenced, operates as a fraud on the other creditors, and makes the composition voidable by any of them, from the nature of the case. In England, from whose law we borrowed this particular feature of ours, it has several times been held that

¹ *Ante*, p. 455.

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if the vote is influenced by good feeling merely, and a desire to benefit the debtor, it will not stand against an objection; and a saying of the learned chief judge in bankruptcy has received the approbation of several courts. "Benevolence, generosity, forbearance, may be well exercised, with this restriction, however, that the practice of these moral virtues is not to be made at the expense of other people:" *Ex parte Williams*, L. R. 10 Eq. 57; see *Ex parte Cowen*, L. R. 2 Ch. 563; *Hart v. Smith*, L. R. 4 Q. B. 61; *Ex parte Russell*, L. R. 10 Ch. 255; *Ex parte Greaves*, L. R. 5 Ch. 326; *Ex parte Deacon*, L. R. 4 Ch. 87. Whether our courts would go so far, I do not undertake to say; but it is clear that a majority arrived at by bribery, though the bankrupt be no party to it, is no fair majority; and it seems to follow that if a vote is influenced by the expectation of advantage, though without any positive promise, it cannot be considered an honest and unbiassed vote.

The man who was undoubtedly bought did not vote or sign any paper, but simply withdrew an intended opposition. In the case of assent to or dissent from a bankrupt's discharge, it has been said by several eminent judges that a creditor has no moral right to oppose, unless for good cause; and so, if the opposition of a creditor is bought off, it must be presumed that there was good ground for opposition: *Browne v. Carr*, 7 Bing. 516; *Hall v. Dyson*, 17 Q. B. 785; *Dexter v. Snow*, 12 Cush. 595. It is not proved that the bankrupt took part in this fraud, and it does not stand on the footing of any other creditor being actually misled, because this creditor signed nothing. Still, as I have said, knowledge must be imputed to the bankrupt in most cases, unless there is clear and undoubted evidence against it.

Order to record composition set aside.

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JUNE, 1876.

A ship whose legal owner is foreign, and whose flag is foreign, is a foreign ship, so far as material-men are concerned, though the equitable owner lives in Massachusetts. Such a ship is not within the statute of Massachusetts, requiring a record to be made of claims for supplies and repairs to vessels.

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Therefore, a material-man in Boston has a lien on such a ship, without recording his claim.

A stevedore has a lien upon a foreign vessel for his services rendered at the request of the master in a case in which the vessel is to stow the cargo.

It seems, if services or a contract properly concern a vessel and her owners, they are maritime services, and can be sued against the owners of a domestic vessel in a court of admiralty, or *in rem* against a foreign vessel.

One representing a vessel to be either foreign or domestic is estopped from setting up the contrary.

By the general maritime law, the presence of the owner does not preclude giving credit to the vessel.

It is a question of fact whether credit is given to a vessel or her owners ; the equitable ownership does not always determine the question of credit.

The United States may have an action against a vessel for tonnage duties ; *it seems*, they may have an action against the owner, and perhaps against the master.

MATERIAL-MEN. — Petition by a committee of the creditors of Isaac Taylor, a bankrupt, asking that the proceeds of sale of the bark George T. Kemp, remaining in the registry after paying the wages for which the vessel had been arrested, might be ordered to be paid to them as representing the creditors generally. This was resisted by the libellants, who claimed liens on the vessel. There was evidence tending to show that the vessel was actually owned by Mr. Taylor, a resident of Massachusetts, doing business in Boston ; that a transfer had been made, in form, to a resident of New Zealand, in order to obtain a British register ; that this was probably done to save the vessel from capture during the war of the rebellion ; that Mr. Taylor remained the true owner ; that the vessel was libelled by material-men, who had furnished her with supplies in Boston, at different times, when she was here in the prosecution of her ordinary business, which was the trade between the Cape of Good Hope and Boston. Some of the material-men knew of the ownership, others did not ; some of the supplies had been ordered by the master, and others by Mr. Taylor ; all the bills had been charged to the ship and owners ; the libellant had taken the note of Mr. Taylor, and had given him a receipt, that the note, when paid, should operate as payment of the account.

S. G. Farmer, for the petitioners. This is a domestic vessel, because the owner lived here : *The Island City*, 1 Lowell, 375 ; *The St. Jago de Cuba*, 9 Wheat. 409 ; *The Superior*, 1 Newb. 176 ; *The Golden Gate*, id. 308 ; *The Alice Tainter*, 5 Bened. 391.

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*F. Dodge, F. Dabney, R. M. Thompson, P. West, & W. E. L. Dil-
laway*, for the libellants. The owner who has put his vessel under
a foreign flag is estopped to deny that she is foreign: *The Laura*,
2 Marit. Law Cases, 225; *The Walkyrien*, 3 Bened. 394. At any
rate, the place of registration is strong evidence of the domicile of
the vessel: *The Sarah Starr*, 1 Sprague, 453.

LOWELL, J. It is now settled that material-men have a lien
by the general maritime law on foreign vessels, including those
which belong in a State of this Union other than that in which
the supplies are furnished, and that domestic vessels are gov-
erned by the domestic law: *The Lottawanna*, 21 Wall. 558. But
what vessels are to be accounted foreign, and what domestic?
No doubt has ever been entertained that the papers and the flag
furnish *prima facie* evidence upon the question; but suppose
the real ownership does not coincide with the apparent or docu-
mentary ownership. This difference may arise in two ways: the
buyer of a vessel registered or enrolled in a State of the United
States different from his own may have neglected to change the
registration or enrolment, without any intention of fraud or con-
cealment, but by inadvertence or neglect. In such a case it has
been held that one who deals with the true owners in the place
of their residence, and knows them to be owners, cannot treat the
vessel as foreign: *The Superior*, Newb. 176; *The Golden Gate*,
id. 808; *The Island City*, 1 Lowell, 375; *The S. G. Owens*,
1 Wall. Jr. 359. It may be observed that Taney, C. J., held
that the port of registration or enrolment decided the character
of the vessel conclusively: *The Loper*, Taney, 500. A similar
decision was made by Judge Betts. There is another class of
cases, like the present, where the real and the apparent ownership
are purposely kept separate. In these, if any false pretence is made,
the person making it will be estopped; as, if he purposely repre-
sents the vessel to be either one thing or the other, he will be
bound by his statement. There are *dicta* which seem to announce
a general rule that the equitable ownership decides the question
in all cases. One of my own has been cited, which seems to go to
that extent. But I am satisfied that they are unsound. It was
formerly said that if the owner were present when the supplies
were furnished, there could be no credit given to the vessel: *The*

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St. Jago de Cuba, 9 Wheat. 409. This *dictum* will account for other broad *dicta*. If this were so, it would be of no particular importance what was called the home port, because wherever the owner happened to be would be such a port *pro hac vice*, and the equitable owner being proved to reside in the place where the supplies are furnished, and this being known to the material-men, there would be an end of the question. This rule cannot stand, because in the home port every thing depends on the local law, and if that gives a lien, notwithstanding the presence of the owner, the admiralty will enforce it: *The Lottawanna*, 21 Wall. 558. Nor is it the law that the presence of the owner precludes the possibility of a credit to the vessel in a foreign port by the general maritime law. This assumption was expressly overruled in *The James Guy*, 1 Bened. 112; 5 Blatch. 496; 9 Wall. 758; and see *The Kalorama*, 10 Wall. 204. Nor will it be safe to say that the equitable ownership governs the case. To one who is ignorant of that fact, the flag is entitled to credit, and would of itself work an estoppel: *The Walkyrien*, 3 Bened. 394; 11 Blatch. 241.

I do not think it can be held that mere knowledge of the equitable ownership makes any difference. The vessel is either domestic or foreign: she must be one, and cannot be both. It comes, therefore, merely to a question of registration of the lien. By the law of Massachusetts, a record must be made; and by the general law there is no need or provision for such record. Is this a domestic vessel under the laws of Massachusetts, as interpreted and restricted within the constitutional authority of the State? I think not. When a ship is put by her owner under a foreign flag, he obtains all the benefits of that position. He ships his seamen according to the law of the flag, and the relative rights and duties of the parties are fixed by that law. In this very case I have decided some matters in controversy concerning the wages by the merchant shipping acts of Great Britain. The courts of the United States cannot punish offences committed on the high seas on board such ships. All international questions, public and private, are controlled by this circumstance. Why not, then, the privilege of material-men?

The theory of exclusive credit to the owner has become a mere

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fiction. No such credit is ever given in Massachusetts. I have never known a ship-chandler that did not prefer two securities to one; and it has been the usage of the trade to make their charges to the ship and owners, hoping and intending to have the security of both. Before the decision of *The General Smith*, 4 Wheat. 438, domestic vessels were held liable, in this district, for all such supplies. I have seen many such cases on our records. Since that decision, the actions in this court for supplies to domestic vessels have been either *in personam*, or have been brought against the ship under some statute of the State. But, in my judgment, Massachusetts has no more to do with vessels rightly and lawfully owned by foreigners, and sailing under a foreign flag, than the United States have; and the statute of the State is not applicable and could not be conveniently applied to such a vessel.

I consider the decision in *The Island City*, 1 Lowell, 375, to be sound, because all parties had treated the vessel as a domestic one, and had recorded their liens upon that supposition; and so, whichever way the law might be, they were in the right; but, as I have already said, some of the *dicta* now appear to me to be broader than the law will sustain. A sound distinction may be taken between nearly all the cases above cited and the present, from the fact that here the flag and nationality of the ship are in question, and not merely the port of enrolment or registry.

I am of opinion, then, that it is a question of fact whether credit was given to the vessel; and, the presumption being the same in Massachusetts as by the general maritime law, and the evidence in this case confirming that presumption, that the libellants had, severally, a lien on the ship; that the ship being registered abroad, and flying a foreign flag by the consent and with the design of her owners, the creditors did not lose their lien by not recording their statement as required by the statutes of Massachusetts.

Petition of general creditors denied.

BROWN'S CLAIM. The petitioners, S. R. Brown & Son, had acted as stevedores in stowing the cargo for the last voyage of the ship, and asked that they might be decreed to rank with the material men against the proceeds.

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R. M. Thompson, for the petitioner.

O. W. Holmes, Jr., & W. Munroe, for the claimants.

LOWELL, J. I am asked to review the decision which I felt bound to make in *The A. R. Dunlap*, 1 Lowell, 350, in which I followed the authorities, against my own opinion, in refusing a similar petition, expressing at the same time the hope that the case would be carried to the circuit court. Longer experience has taught me that cases of this sort rarely go beyond this court, and under these circumstances, the suitor, whose position I consider sound, has a right to my judgment. Besides, it will be found, upon a critical examination of the decisions which I followed, that, although they have never been overruled on this special point of a stevedore's lien, their course of reasoning has been declared unsound by the highest authority; and so an adherence to the mere result of those cases is not defensible on the ground of *stare decisis*, because it is standing by the letter at the expense of the principle.

The cases referred to are *The Amstel*, Blatch. & How. 215; *The Joseph Cunard*, Olcott, 120; *The S. G. Owens*, 1 Wall. Jr. 370. The reasons are more fully given in the first case than in the others, but are alike in all. They are, first, that a stevedore works on land, or on a vessel at the wharf; and, second, that his concern is with the cargo rather than with the ship, and they liken him in this respect to the drayman, who brings the cargo to the vessel. The notion that the maritime character of a contract for either labor or materials, or of the remedy for furnishing them independently of contract, depends upon the situation of the vessel as being upon the high seas or in a dock, reached its climax when it was held that a laborer who scraped the bottom of a foreign vessel, preparatory to her being coppered, had no lien: *Bradley v. Bolles*, Abb. Adm. 569; and that the ship-keeper of a domestic vessel could not sue even *in personam*, in the admiralty: *Gurney v. Crockett*, Abb. Adm. 490.

These decisions were made during the time, after Judge Story's death, when the supreme court seemed bent upon narrowing the jurisdiction in all possible directions, by decisions, some of which have now been overruled and others explained to mean much less than they appeared to intend. Judge Betts, in the

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decisions above cited, was evidently embarrassed by this state of opinion; for he had himself decided, ten years earlier, that a watchman or ship-keeper, who was given a lien by a State statute, might proceed for it in the admiralty; which, of course, decided that the labor or contract was maritime, and, by consequence, that a proceeding *in personam* would lie: *The Harriet*, Olcott, 229. It is now settled that a contract for supplies and repairs or other necessities to a vessel is maritime in its nature, because it has to do with a ship. While, therefore, I agree that the stevedore is not a mariner, and has no lien on a domestic ship unless the local law gives it, I cannot hold, consistently with the present binding authorities, that his contract is not maritime. And so of the ship-keeper. If the services or contract properly concern the ship and her owners, they are clearly maritime, and can be sued against the owner of a domestic ship personally, or against the foreign ship *in rem*, in this court. The cases in the supreme court are so recent that I do not cite them.

This brings us to the second point, that the ship and owner are not concerned with the wages of a stevedore, because they relate only to the cargo, and therefore are not maritime. Mr. Benedict expresses his unhesitating opinion that the service is maritime: Bened. Adm. (2d ed.) § 285. Judge Benedict expressed a similar opinion, though he felt bound to follow the decisions: *The Circassian*, 1 Bened. 209. That was a domestic vessel, and I consider his decision to have been right, as well as his general opinion; that is, the service is maritime, but it gives no lien, unless by the State law. Whether a stevedore is a material-man, strictly speaking, may be doubtful; but I apprehend that the law itself is no longer doubtful that one who furnishes what is reasonably necessary for a foreign ship, her voyage or business, stands on the same footing towards the ship as a material-man: *Thomas v. Osborn*, 19 How. 22; *The Emily Souder*, 17 Wall. 666. And, if it was ever true, it is no longer so, that the ship is only responsible for what is physically annexed to it, such as repairs. In most cases the responsibility of the owner and of the ship are, by our law, coextensive; and whatever the master has the right to buy on credit will bind both, and this is not only what is absolutely necessary for the ship and crew, but for the voyage or

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business of the ship: *The Fortitude*, 3 Sumner, 228; *The Gustavia*, Blatch. & How. 189; *The Grapeshot*, 9 Wall. 129; *The Medora*, 1 Sprague, 188; *The Robert L. Lane*, 1 Lowell, 388; *Stearns v. Doe*, 12 Gray, 482; *Webster v. Seekamp*, 4 B. & Ald. 352; *Weston v. Wright*, 7 M. & W. 396; *The Alexander*, 1 W. Rob. 362; *The Riga*, L. R. 3 Eccl. & Adm. 516; *The Zodiac*, 1 Hagg. 320; *The Duke of Bedford*, 2 Hagg. 294; *The Gauntlet*, 3 W. Rob. 82. I am not now speaking of the necessity for a credit, which has been pretty much explained away. There is no doubt that the ship is liable in this case, if a ship would usually be liable in like cases. It seems incredible that it could ever have been thought that the master, who in proper cases may charter, hypothecate, or even sell his ship, cannot bind it for the cost of stowing the cargo, which is one of the ordinary and self-evident necessities of a voyage. The above-cited cases show what expenses may be made by the master on the credit of the owner or in bottomry. I will, however, cite one or two late decisions, to show the character of the charges which are now held to be legitimate liens upon a vessel without a bond.

It is well known that the high court of admiralty in England was, for some centuries, prohibited from enforcing these tacit hypothecations; and that an act of parliament has now given that court jurisdiction to decide all claims and demands for necessities supplied to a foreign vessel: 3 & 4 Vict. ch. 65, § 6. Thereupon the tacit lien revived, without mention of lien in the statute, and the courts have held, that not merely what is necessary for the ship, but what is reasonably proper for the voyage, comes within the statute. The decisions are cited and explained in *The Riga*, *ubi supra*; in which, among other charges, the following were allowed as necessities: tonnage and harbor dues, services of the libellant as agent and broker in procuring a charter, premium of insurance paid at the request of the owner. In *The Emily Souder*, 17 Wall. 666, 669, Field, J., says, "The moneys advanced by the libellants, it is true, were not entirely for the repairs to the vessel and the supplies needed for the voyage: they were intended and applied in part to meet the expenses of her towage into port and of pilotage, and to pay the custom-house dues, consular fees, and charges for medical attendance upon the

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sailors. These various items, however, stood in the same rank with necessary supplies and repairs to the vessel, and the libellant's advancing funds for their payment, were equally entitled as security to a lien on the vessel."

These cases are decisive. If the person who advances the money has a lien, it is because the service paid for was necessary. The stream cannot rise above its source. I hold, therefore, that the stevedore has a lien on a foreign ship for his services rendered at the request of the master in a case in which the ship is to stow the cargo.

Petition granted.

CLAIM OF THE UNITED STATES. Petition for \$120.97, tonnage duties.

LOWELL, J. The account presented by the United States for tonnage duties is the only one left to be disposed of. The law is, that upon vessels entering at any custom-house from any foreign port or place there shall be paid tonnage duties: Rev. Sts. § 4219. How or by whom these dues are to be paid is not expressed in the statute. Mr. Justice Story held that the consignee of a foreign ship was not personally liable to the United States for their payment, but said that the owner would be: *U. S. v. Hathaway*, 3 Mason, 324. It seems to me that a charge distinctly placed by a competent statute upon a ship, is payable by the ship. To be sure, by Rev. Sts. § 4206, all legal fees which shall have accrued on any vessel are to be paid to the proper officers before a clearance is granted her; and it is argued that this is the statute remedy, and is *expressio unius*. It is true that, where a statute creates at once a right and a remedy, the latter is in general exclusive. But this, of course, is so only when the statute is to be so understood; and I doubt whether the remedy must not be of a judicial or executive character against some person or thing. The mere right to refuse a clearance cannot be intended as the sole remedy for tonnage duties, because it is inadequate and incomplete, and for several other reasons. They are to be paid by the same ship but once a year; and, if refusing a clearance is the only remedy, then if the vessel is once assessed, and the collector neglects to refuse a clearance, all remedy is gone, unless the vessel should happen to enter the same port

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again. So, if the vessel does not need a clearance, as may well happen, or chooses to take the risk of going to sea without one, the remedy is gone.

My impression is that the collector may refuse to enter as well as to clear a vessel which has not paid her tonnage duties; but supposing him to neglect or forget to do so, or supposing the vessel not to care about a clearance, I think the United States have an action for the duties against the owner, if they can find him; and perhaps against the master; and also against the thing, being a ship, upon which the duty is imposed, and more distinctly, I should say, against the ship than against the owner. It differs from ordinary duties on imports in the very important particulars, that those are not ships, and that the mode of collecting those duties is carefully pointed out, so that a remedy is provided; and, if it were not, there is nothing to give the admiralty court, as such, jurisdiction. But a charge on a ship, if it attaches to the ship itself, ordinarily gives this court jurisdiction, even in those domestic cases which require the sanction of a State statute for the creation of the charge.

In the case of *The America*, 1 Lowell, 176, I decided that a State statute imposing a charge upon a ship for pilotage might be enforced in the admiralty. The case of pilotage in the supreme court was *in personam*; but the reasoning is identical, as far as it goes, with that in *The America*. See *Ex parte McNeil*, 13 Wall. 236. It is true that pilotage is a maritime contract; but half pilotage imposed by statute, for not accepting a pilot, is only constructively a contract; only so because the statute makes it a debt rather than a penalty. I can see no legal distinction between pilotage dues imposed on a ship for entering the harbor without a pilot, and tonnage dues imposed on the same ship for entering for trade.

Petition granted.

Ex parte Howard National Bank. — *Re* North & Co.

Ex parte HOWARD NATIONAL BANK. — *Re* C. H. NORTH & CO.

JUNE, 1876.

A deposit in a bank becomes, upon the bankruptcy of the depositor, a security for and payment *pro tanto* of his liabilities to the bank, by the operation of the law of mutual credit.

The deposit should be set off against the aggregate amount of the notes of the bankrupt on which he is principal debtor, or on which, he being indorser, the real principals are insolvent. Solvent principals, for whom the bankrupt is surety, must pay their own notes.

It seems, if a bank has contingent or unliquidated claims against a bankrupt depositor, his deposit may be retained by the bank until it is ascertained what the provable debt is, if any, and then it can be used in set-off so far as is necessary.

In composition cases, in which no assignee has been appointed, the debtor stands in the position of an assignee in respect to set-off.

COMPOSITION. — SET-OFF. — C. H. North & Co., having failed, filed their petition in bankruptcy in March, 1876, and soon after offered a composition of fifty per cent, which was accepted and recorded in April. Upon their schedules were several notes signed by various persons and indorsed by the bankrupts, and other notes signed by the bankrupts and indorsed by sundry persons, which had been discounted by the Howard National Bank of Boston, of which some were overdue before the composition was effected, and some were not yet payable. The bank had about \$2,000 of the money of North & Co. on deposit. When the composition was recorded, the bankrupts, together with the several parties, respectively liable on certain of the notes, went to the bank and took up the paper, nothing being said about the deposit. Afterwards, the bank claimed the right to apply the deposit upon a note signed by D. M. Oliver & Co., and indorsed by North & Co., which came due in May; and the latter insisted that the credit should be given on an earlier note signed by J. N. Tryon, and indorsed by the bankrupts, which was overdue when the composition was made. This question was submitted to the court on the foregoing facts.

N. Morse, for the debtors, contended that they had the first right of appropriation, as in case of payment of money by a debtor to his creditor; that the bank had the next right; but that, as

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nothing was done about it up to the time of the composition, the deposit should be applied to the debt which came due the earliest.

H. D. Hyde, for the bank, argued that it was like collateral security, which the holder may appropriate in the mode most beneficial to himself.

LOWELL, J. This deposit, though it operates as security and as payment, was not intended for either, but is made so by the bankruptcy of the debtor; the law being unwilling that the bank should be called on to pay its debt to the assignee in full, and receive only a dividend on the debt due from the bankrupt.

I have been referred to no decision which approaches this case, and have not had time for a thorough examination; though I venture to think I should know of some of the cases, if there were many.

It would be easy to put a variety of supposed cases, in which the assignee or the bank might be thought to have equities on the one side or the other, and I have exercised my mind somewhat in that direction; but, on the whole, I have come back to the language of the statute, and find the simplest way the best. The statute says, that, in all cases of mutual debts or mutual credits between the bankrupt and a creditor, the account between them shall be stated, and one debt be set off against the other, and the balance only be allowed or paid, as the case may be. In bankruptcy, all debts are to be liquidated as of one and the same day; and the reason for applying a payment to the first debt rather than the second ceases, for that reason is the presumption that a debtor intends to begin at the beginning. There is no beginning nor end to debts in bankruptcy, excepting that they must be debts, or be capable of liquidation at some time before the case is closed. There can be no doubt, for instance, that if the bank held mere contingent debts or contingent liabilities, or a claim for unliquidated damages arising by contract, the deposit must be left in their hands, until it could be ascertained what their provable debt would be, if any thing; and that it might then be used as a set-off.

In this state of the law, it appears to me that the credit should be set off against the whole ultimate debt to the bank; that

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is to say, against the aggregate amount of the notes of the bankrupt in which he is the principal debtor, and as to those in which he is indorser, so far, and so far only, as is made necessary by the insolvency of the real principals. Where he is surety for solvent principals, they must pay their own debts.

When a debtor pays money, he may dictate the mode of its application at his pleasure, for the reason that he might have withheld the payment altogether. If he gives security, he gives it for such debts as he agrees to have it applied to. If payment is made generally, or security is given without restriction, the creditor has the right of appropriation; because it is presumed that the debtor would have signified his choice, if he had any, or, if the security was part of the bargain, that its special application would have been cared for when the bargain was made. A set-off created by law to prevent injustice does not stand on the footing of contract. The money or credit belongs to the assignee for the use of the general creditors; but the law says he shall not recover it in full, and turn the particular creditor over to a dividend. This leaves the appropriation, not to the actual or presumed intent of the parties, for there is none, but to the operation of the law of mutual credit.

I understand the practice in England to be, that a banker who has discounted notes for his customer may prove for the whole money as so much lent the customer, exhibiting a list of his notes or bills, which are called securities. Any deposit the banker has in hand would come out of this sum total. If, however, any bill or note is paid by other parties after the proof has been admitted, its amount is to be deducted from the total debt proved. In other words, the proof is considered as made on each note or bill separately, though not so in form. See *Ex parte Burn*, 2 Rose, 55; *Ex parte Barratt*, 1 Gl. & J. 327; *Ex parte Hornby*, DeGex, 69.

It is plain, that, if it were our practice to prove in this way, we could only require such notes and bills to be struck out as were paid by the parties primarily bound to pay them; because all sureties and indorsers, and other persons in similar relation to the bankrupt, can retain the proof of the creditor against the estate of the principal debtor: and I suppose this to be the law of Eng-

land too, though it has not been applied there to this precise case. The effect of such a mode of proof, and of such subsequent modification of it as obtains in England, would be, that the set-off would practically be applied *pro rata* to the whole primary debt of the bankrupt, and to so much of the debt which he had contracted as indorser or surety for others as they were not able to meet; which is the result I have reached by a somewhat different way.

In this district, it is not the law, and I suppose it is not the custom of bankers, to consider the discounts as money lent, and the notes as security; but each note is treated as a separate contract, and is to be so proved in bankruptcy. This is undoubtedly the law of Massachusetts; but the law of England seems to amount to nearly the same in practice, with the important exception, that the banker there can vote on his whole debt at the first meeting, while here he can vote only on the absolute debt, reserving his proof against the bankrupt as drawer or indorser until the several notes or bills shall have been dishonored, — a practice which seems simple and just, and which puts a holder of notes, which he has bought in the market, on the same footing with the banker who has originally discounted them for the person who afterwards becomes bankrupt.

There is a class of cases, bearing some resemblance to the present, which tend to support the rule I adopt. The several indorsers of the bankrupt's notes are considered as *quasi* sureties for him. If, therefore, they pay the notes, they can stand in the place of the bank; and they have an equity to say that any security or set-off which the creditor holds shall be duly applied towards the debt. This is admitted law. Now, in many cases where a creditor has had a surety for a specific part of his debt, and has proved the whole debt against the bankrupt principal, it has been held that he must give credit for the dividends *pro rata*, so as to relieve the surety in the proportion that the debt for which he is liable bears to the whole. This doctrine has been applied where there were several guarantors or sureties for given amounts, and to the case of accommodation acceptances, where the acceptors, having paid the bills, were subrogated to their proportion of the whole debt proved against the principal. I see

Ex parte Hobbs. — Re Hapgood.

no distinction in the doctrine, but only in the mode of its application between that case and this. Here is a sum of money which the law says shall be a payment, not of any particular part, but generally, of the debt of the bank; and I think each indorser may say that he has an interest in so much of it as will be represented by the note he has indorsed compared to the whole debt. Cases involving the principle which I refer to are *Ex parte Turner*, 3 Ves. 243; *Ex parte Rushworth*, 10 id. 409; *Re Plummer*, 1 Phillips, 56; *Hobson v. Bass*, L. R. 6 Ch. 792; *Paley v. Field*, 12 Ves. 485; *Bardwell v. Lydall*, 7 Bing. 489; *Gray v. Seckham*, L. R. 7 Ch. 680.

I have treated this as a case between an assignee and a creditor, because the bankrupt in a composition case stands, as to set-off, in the position of an assignee, if none has been appointed.

The credit is to be set against the aggregate debt of the bank, not including any notes upon which the bankrupt is surety, unless the principals are insolvent.

Ex parte HOBBS. — Re HAPGOOD.

SEPTEMBER, 1876.

Where a bankrupt, being trustee, has deposited trust money, with his own, in a bank, in his own name, his *cestuis que trustent*, or he as representing them, may have a trust declared in the trust-moneys.

The apportionment of the balance of the bank account may be ascertained from the dates of deposits and withdrawals of the trust, and the general funds, respectively.

MR. HAPGOOD, the bankrupt, was trustee, under a private assignment made by S. Sutton & Co. for the benefit of their creditors. In the course of settling that estate, he sold machinery and other assets, and paid certain charges and privileged debts; and in February, 1876, he had received \$1,500 or thereabouts more than he had paid out. The money received, when not paid out at once, was deposited in the Revere National Bank with Hapgood's own money and to his own credit; and he testified that his average monthly balance in the bank was always

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equal to the amount due from him as trustee. In February, 1876, finding himself insolvent, he opened an account in the same bank as trustee, and drew out the \$1,500 from his individual account, and deposited it to the new account. Within two months afterwards, he was adjudged bankrupt; and his assignee petitions to have this money so deposited to the new account declared to be assets for the general creditors of Hapgood, as having been set apart by way of preference. The bank submits to whatever decree the court may make. Hapgood defends on the ground that no preference was intended or was effected.

R. M. Morse, Jr., for the assignee, cited *Balcom v. Russell*, 2 Dillon, 215; *Re Hosie*, 7 N. B. R. 601; *White v. Jones*, 6 id. 175; *Re Janeway*, 4 id. 100; *School Dist. v. First Nat. Bank*, 102 Mass. 174.

C. H. Fiske, for Hapgood, cited *Pennel v. Deffell*, 4 DeG., M. & G. 372; *Ex parte Sayers*, 5 Ves. 169.

LOWELL, J. The question raised by the case stated and submitted by the petition and answer, and which is thus brought within the jurisdiction of the court without the formality of a plenary action, is whether the bankrupt gave a preference to himself as trustee, by transferring a part of his bank account from his own name to himself as trustee. This question cannot be answered fully upon the facts as yet proved.

If it be true that the change in the form of the account operated to set apart a greater proportion of the deposit than was already affected by the trust, upon the principles presently to be explained, then it was an unlawful preference to that extent. In the United States it has been held, without qualification, that an insolvent has no greater right to pay or secure debts which he is under a very strong moral obligation to pay, than any others. On the whole, I consider this rule the only safe one; but it works hardship in some cases. If it be true that the now bankrupt deposited the trust money with his own account, simply for convenience, and always kept enough in the bank to enable him to pay out at any moment what he owed the creditors of Sutton & Co., it was the merest technical preference that he committed in setting apart that amount when he became aware of his insol-

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veney. Still, it was a technical preference under the decisions, because he was merely a debtor to the trust; and he transferred a credit from himself, as an individual, to himself as trustee, in order to make his trust secure.

But the defendant presents the case in another point of view, which is important: He says that if it be true that his general deposit of the trust funds and his own together made him a debtor to the trust, and subjected him personally to make good any loss that might occur from the failure of the bank, or from any set-off the banker might have against him, still his *cestuis que trustent*, and he as representing them, may have a trust declared in these moneys, and would have had such a right after his bankruptcy, though no separation had been made before that time. He cites *Pennel v. Deffell*, 4 DeG., M. & G. 372. In that case an official assignee had two bank accounts standing in his own name, in which he deposited moneys belonging to various bankrupt estates, and moneys of his own. He died insolvent, and the contest was between his general creditors and his creditors in the trust; and the court decided, upon reasoning which is satisfactory to my mind, that a trust ought to be declared, not for the general creditors exclusively, but according to the facts; that is to say, taking the deposits and the withdrawals in the order of their dates, find out how much of the balance remaining at the death of the trustee belonged to the trust, how much to the general fund, and divide accordingly. They refused to admit that the whole should be attributed to the trust, until that was made good, any more than that the whole should be general assets. One of the learned judges says, that, if the former were the rule, it would follow that in all cases where trust moneys were paid by a trustee into a bank, they must be held to have remained there so long as the trustee may have had moneys of his own there to answer his drafts, whatever may have been the dealings with the account, and however long it may have continued.

There is no doubt that the assignee in bankruptcy is bound by all trusts and equities which attach to any property in the hands of the bankrupt. If the bankrupt had deposited his trust money, and nothing else, in a bank, the *cestui que trust* could

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follow it, whatever the name in which the account was kept: *Kip v. Bank of N. Y.*, 10 Johns. 68. If, on the other hand, it had all been put in the bankrupt's name as trustee, the converse would be true: his general creditors could have it, if they could prove property in it. In either case, the only essential would be to trace the property. The only difficulty arises from the confusion of the trust money and the debtor's own money; and the case cited points out a reasonable and just mode of disentangling the account. It says: Prove what trust money has been paid in, and what of the bankrupt's money and when, and prove what has been drawn out and when; then, by striking the account at any time, you will find how the balance in the bank is to be apportioned, because you will see how that balance originated, whether from trust money or not, or in what proportions.

I adopt that mode of settlement. The bankrupt may state the account, and ascertain how much, if any, of the money transferred 29th February, 1876, was trust money according to the method above mentioned; and for that sum he may retain the deposit. For any deficiency, he, as trustee, must take a dividend concurrently with his general creditors out of the general assets.

THE NELLIE.

OCTOBER, 1876.

If the master of a vessel injured by collision through the fault of the other party conducts himself with reasonable skill and diligence after the collision, the damages occurring from a necessary act, such as beaching his ship, will be chargeable to the wrong-doer. Such damages were allowed, though the master was informed that a better place for beaching his vessel was to be found.

The value of a boat stolen from the master of the injured vessel was disallowed, there being no necessary or probable connection proved between the collision and the theft.

LOWELL, J. The claimant contends that the master of the *Hulloneon*, after the collision had occurred, was negligent and unskilful in beaching his vessel where he did, and again in making the contract which he made for raising her. On the second point the claimants are almost estopped, because they were twice

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applied to, and asked to make the contract or to give their advice about it, and refused. To be sure, they were not bound to advise, and therefore they are not technically estopped; but they were fully notified and warned; and if they thought at that time that it would be so much better to contract by the day than by the job, they would have run very little risk by saying so. After it has turned out that one mode might probably have been better than the other, it is easy to suppose that this was clear from the beginning; but, if it really was so, why was the light withheld?

The first point is similar in the principle which must govern its decision. As to both points, the following cases are cited: *The Linda*, Swabey, 309; *The Flying Fish*, Brown. & Lush. 436; and to these may be added *The Catherine*, 17 How. 170. These cases decide that the vessel which is responsible for the collision is not bound to make good damages which do not fairly and necessarily result from the wrongful act; and that, if the master or owners have been guilty of rash or even negligent conduct, by which the damages are largely increased, the court is to ascertain, by the best means in its power, what the damage was or would have been if the subsequent conduct of the injured party had been prudent and skilful. The editors of Browning and Lushington's Reports, in a note to *The Flying Fish*, suggest that perhaps even this damage ought to be divided between the parties, on the ground that it was partly caused by the collision. But those learned persons, I fear, may be suspected of a design to cast ridicule upon the rule itself, which they afterwards say is an embarrassment in practice. At all events, no court has ever decided that the damages caused by A.'s negligence were partly due to an antecedent negligence of B.

The evidence in this case falls very far short of that given in the two English cases; and, though *The Catherine* is rather briefly reported, it would seem that it resembled them. If so, they were all clear cases of a reckless negligence, almost amounting to the wilful loss of a vessel, which might easily have been, and in the American case actually was, saved and repaired at a comparatively trifling expense; and this was not only obvious at the time, but, in the two cases which are fully reported, was pointed out to the master, and he was urged to save his ship.

Ex parte Hemenway. — Re Stevens.

Here the evidence is that some one advised the master to beach the vessel a few rods higher up the shore than he did, and told him that it was a better place for the purpose. This is a very different state of things from those on which the above-cited cases were decided. I agree with the assessor that there is no such evidence of negligence as should throw upon the Hulloneon the loss, if any, which was incurred by the vessel being beached where the master thought best to put her.

The first objection taken by the libellant illustrates somewhat this matter of remote damage. The assessor has disallowed the value of a boat which was stolen, not from the vessel, but from a wharf in Boston, on the night after the collision. Granting that damages might be recovered for all direct losses, even if one of them should be a plundering which no means within the reach of the injured party could prevent, yet the theft of a boat hours afterwards, at a different place, has no such natural or necessary connection with the collision as to be one of its legal consequences. Indeed, I do not know, and no one can say, that it had any connection whatever with that event. The boat was stolen from a place where boats are often left, and where this master might have left it if he had had occasion, though his vessel were safely riding at anchor in the stream.

J. C. Dodge & F. Dodge, for the libellants.

F. Goodwin, for the claimants.

Decree for libellants for \$1,084.25 and interest from the date of the libel and costs.

Ex parte HEMENWAY. — Re NELSON B. STEVENS.

OCTOBER, 1876.

A tenant, who substitutes some fixtures for others, still serviceable, belonging to the landlord, cannot remove them at the expiration of the lease, without accounting to the landlord for those which he removed.

The right of the tenant to remove fixtures is not lost by non-payment of rent and notice to quit, but only by quitting. If the landlord has prevented the removal by an attachment of the fixtures, the right is not lost even by leaving the premises.

A parol renewal of a lease renews whatever rights the tenant had to remove the fixtures.

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TENANT'S FIXTURES. — A special case was submitted to the court respecting the title to certain gas fixtures and bar-room fixtures, situated in the Marlborough Hotel, on Washington Street, as between the landlord and the tenant's assignee in bankruptcy. The fixtures of the bar-room had been put in by a former tenant, who held under a written lease not produced in evidence, and the premises had been transferred by him, during his term, and from one tenant to another, and at last to the bankrupt; and each tenant had sold and transferred to his successor, by a bill of sale, all his furniture and fixtures, but without a particular description or a schedule. The original term expired, and no new lease was given; but the several successive tenants held on under parol tenancies, without any agreement with the landlord as to fixtures. Before the bankruptcy of Stevens, the landlord had notified him to quit, and had obtained possession of the premises; but, some days before the notice to quit, the landlord had laid an attachment on whatever chattels belonged to the tenant, not specifying what they were.

The gas fixtures had been substituted by a former tenant for others belonging to the landlord, for which the tenant had never accounted.

It was admitted at the hearing that a part of the fixtures of the bar-room were mere chattels, which belonged to the assignee; but the bar or counter, and certain things annexed to it, were in the nature of tenant's fixtures, which, it was agreed, might have been removed during his term by the tenant who put them in; but the question was, whether that right ever inured to the bankrupt, and, if so, whether he lost it when he lost his tenancy.

J. F. Barrett, for the landlord.

R. Stone, Jr., for the assignee.

LOWELL, J. The gas fixtures come fairly within the intimation of the court in *Whiting v. Brastow*, 4 Pick. 810, where it is said, "A padlock can in no sense be called a fixture, for it can be taken away without injuring or defacing the building. If put there by the landlord, or by the tenant in lieu of one found there, it would be the landlord's property, though not a fixture." It is proved or admitted that the gas fixtures were put there in lieu of those which the landlord had, and not because they were

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worn out, but that the tenant preferred a different style and appearance, perhaps more modern. The principle would not be of very extensive application, but in such a case as this the clear presumption is, that the tenant gave these fixtures to his landlord, instead of those which he took out and failed to account for.

As to the counter and its appurtenances, the first question is, whether, by the expiration of the term of the original lease, these fixtures became dedicated to the landlord, so that the bankrupt acquired no property in them; and the second, whether, if he had a title, it was lost before the bankruptcy.

Taking the second question first, it was admitted that the landlord's attachment was intended to hold whatever belonged to the tenant, and that any attempt on his part to remove fixtures would have been resisted by the officer, in due pursuance of his precept. The attachment having been laid by the landlord himself before the notice to quit, and having been dissolved by the bankruptcy, the assignee should be in no worse position than the bankrupt was in on the day that he quitted possession. Did the forfeiture or loss of the tenancy by non-payment of rent and notice to quit destroy the right to sever and remove the fixtures? Mr. Taylor, in a note to the latest edition of his valuable work on Landlord and Tenant, says, in general terms, that the right is determined by an entry for condition broken.¹ Only one of the cases which he cites supports the proposition, or indeed touches on the point at all.² That case is *Whipley v. Dewey*, 8 Cal. 36, in which a tenant, some time after his tenancy was ended, undertook to remove buildings, which, by the agreement between him and his landlord, were removable. The true ground of decision appears to be that the right was lost by laches or non-user. The learned judge who delivered the opinion of the court says that it is well settled that a tenant cannot remove erections made by him on the premises after a forfeiture or re-entry for condition broken. He cites no cases, and I have found none, to support that doctrine, unless in the same sense that no tenant can remove fixtures after his tenancy is out, which, perhaps, is all that is intended.

¹ Taylor, § 551, note 2 (6th ed.).

² One other case refers to emblements, but they do not seem to me very closely analogous to fixtures: *Davis v. Eyton*, 7 Bing. 154.

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In *Weeton v. Woodcock*, 7 M. & W. 14, the lease was to be forfeited by bankruptcy. The tenant became bankrupt, and the landlord entered; and the assignees, three weeks after, sold the fixtures. The jury found that they had not sold them within a reasonable time; and the court sustained the verdict for the landlord with a *semble* or suggestion, in the opinion of Alderson, B., that perhaps the assignee's title was lost as soon as the entry was made. In the later case of *Stansfield v. Mayor of Portsmouth*, 4 C. B. N. s. 120, this subject was thoroughly argued at the bar. The lease there contained an agreement that certain machinery should belong to the landlord, and machinery of all other kinds to the tenant; and the court held that the assignees of the tenant could remove his part of the machinery, though the lease was forfeited by the bankruptcy and the landlord had re-entered. They avoided deciding the point as a general one, and put it on the stipulation of the lease, or, rather, on the fact that there was such a stipulation; for there was no very apparent difference between the covenant and what the law would have been without it, its true object being merely to point out which of the fixtures belonged to the one party and which to the other. If this decision is followed in England, it will probably lead to the enunciation of a general principle in favor of the tenant.

These are the only decisions I have had time to find, and none others have been cited to me. I am of opinion that by the law of Massachusetts the right to remove fixtures is not absolutely lost by non-payment of rent and notice to quit, and I say it with no particle of doubt. I will not dwell upon the great injustice which might be worked, especially to a tenant's creditors, if this were the law: they are obvious, and are of themselves enough to make such a rule odious, and I had almost said impossible. It will be observed that here the attachment, which effectually prevented any dealing with the fixtures, was before the notice to quit; and, therefore, to save this part of the case to the landlord, his contention must be that no tenant whose rent is in arrear can take out his fixtures, which will hardly be argued; and, besides, this was not a case of forfeiture for condition broken, but of termination of tenancy by a statutory notice. My own opinion is, that for non-payment of rent the landlord, in case of an

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oral demise, has his statutory right to recover the premises, and to sue and attach the property of his tenant, and that these are his only remedies, unless the tenant, having an opportunity to remove his fixtures, chooses to leave them behind him when he goes out.

Whether the fixtures were surrendered before the bankrupt's holding began, is the only remaining question. It is clear that the lessee who put up these fixtures could assign them, as he did, during his term. It is equally clear that any number of successive parol occupancies from year to year, or from month to month, by the same tenant, make up, when they are past, but one tenancy: *Birch v. Wright*, 1 T. R. 380; *Rex v. Herstmonceaux*, 7 B. & C. 551, per Bayley, J. And the successor of such a tenant, in the absence of evidence of any new or different contract with him, succeeds to the duties and the rights of his predecessor: *Buckworth v. Simpson*, 1 Crompt., M. & R. 834. So that the true point is, whether, by the expiration of the term of the written lease, the then tenant, by holding over and continuing under terms and conditions not given in evidence, and therefore to be taken to be those of the written lease so far as applicable, lost his right or privilege to remove the fixtures which had been put in during the term of the written lease.

It has been decided that a mere holding over of a tenancy from year to year does not affect the tenant's right in this respect, and that so long as he holds under a fair claim of right as tenant he preserves his privilege: see *Penton v. Robart*, 2 East, 88, and the remarks in *Roffey v. Henderson*, 17 Q. B. 574; *Heap v. Barton*, 12 C. B. 274; *Minshall v. Lloyd*, 2 M. & W. 450; *Weeton v. Woodcock*, 7 id. 14.

On the other hand, it has been decided that one who accepts a new written lease of the same premises, with their buildings, &c., from his landlord, on the expiration of his former tenancy, has impliedly admitted that the fixtures, of which he accepts a demise, belong to the lessor: *Loughran v. Ross*, 45 N. Y. 792. Another case is sometimes cited for this proposition, *Shepard v. Spaulding*, 4 Met. 416; but in that case the tenant had made a written surrender to the landlord, who held the premises for some years, and afterwards let them to one who let them to the original

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tenant; and it was held that the tenant could not afterwards remove a building which he had put up during his first term.

Both these cases turn on the intent to be derived from a written instrument, and do not govern the case of a mere holding over. Upon that the following *dictum* is more pertinent: "If a tenant remain in possession after the expiration of his term, and perform all the conditions of the lease,¹ it amounts to a renewal of the lease from year to year, and, I take it, he would be entitled to remove fixtures during the year:" per Woodward, J., in *Davis v. Moss*, 38 Penn. St. (2 Wright) 353. Those cases, I say, turn on the implied agreement of the parties; and this case finds "there was never any agreement between the landlord and tenants who succeeded said Meserve or said Roberts & Champlin in respect to said fixtures," and goes on to say that bills of sale were made of the chattels and fixtures from one tenant to the next, but without any notice to the landlord.

Under these circumstances, I am of opinion that the fixtures of the bar-room were never surrendered to the landlord.

It was said that each tenant should have severed the fixtures when he sold his lease, or whatever he did sell, and the new tenant should have reannexed them. But the law does not compel vain and useless trouble and expense. If that would have saved the right, I am clear that it was saved without it.

Judgment, that the landlord owns the gas fixtures, and the assignee those of the bar-room.

BAKER v. HEMENWAY (THE CITY OF VALPARAISO).

NOVEMBER, 1876.

A steamship, worth, with her cargo, \$500,000, took the ground in the harbor of Boston, and was pulled off, at about high water, by a large tug, assisted by the engines of the steamship, and by two small tugs, the principal power being furnished by the ship and the large tug, and the small tugs being occupied less than an hour. *Held*, that the small tugs had rendered a salvage service:

That they were to be paid a liberal compensation, much more than their hire for an hour, but not one into which the value saved would enter as a very important element:

Sums decreed, \$300 and \$400.

¹ A written lease was in question.

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SALVAGE. — The City of Valparaiso was a new steamship, built in England, and intended for the trade between Boston and Chili. In going down the harbor of Boston on her first voyage she grounded on Lovell's Island in the daytime, about an hour and a half or two hours before high water. The wind was strong from the north-west, and tended to set her further on the shoal. She had a large and powerful tug, called the C. S. Winch, in attendance, to bring back some passengers; and, while lying aground and backing her own engines with all their power, she accepted the services of the two comparatively small tugs, the Macy and the Woolley, whose owners and crews bring this libel. The Macy assisted the Winch in pushing against the steamer's quarter, to keep her up to the wind; the Woolley assisted in drawing her off. The steamer was aground a little more than an hour. The facts were not seriously disputed; but the opinions of the witnesses were opposed upon the question how far the services of the tugs were important to the safety of the ship, her own witnesses testifying that she had ample means to haul off by anchors, &c., in addition to her engines, in case those alone had failed. The after-part of the ship was lightened by pumping out the water ballast. The vessel pursued her voyage to Valparaiso and back, and on her return was found to have been considerably injured by taking the ground, though the leak caused by it was not large. The ship and cargo were worth nearly half a million dollars.

J. C. Dodge, for the libellants.

E. R. Hoar & S. Hoar, for the respondent.

LOWELL, J. That a vessel in distress accepting services without a special contract, and in the absence of a usage of the port, accepts a salvage assistance, is abundantly established. It will be enough to cite some of the decisions in this circuit, though the law is the same in all: *The Versailles*, 1 Curtis, C. C. 353; *The Independence*, 2 id. 350; *The Island City*, 1 Clifford, 210; *The Susan*, 1 Sprague, 499; *The James T. Abbott*, 2 id. 101; *The M. B. Stetson*, 1 Lowell, 119; *The Coringa*, id. 154.

The important and difficult part of the case is not the name by which it is called, but the amount which shall be decreed. A very large value was saved, but under circumstances which

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do not contain other elements which should require the *quantum* to be large. The service resembled towage. I do not mean that there is any generic difference between towage and salvage. In the absence of a contract, the towing of a vessel in peril or disabled is salvage; but as a convenient word to distinguish an ordinary case of contract from one of salvage, "towage" is often used.

The increased use of tugs, and their rivalry, have operated to reduce the value of a salvage service in most of the ports to something not very much beyond the price of a towage contract contingent upon success. Competition has established what might almost be called a *quantum meruit* for cases of this kind. A striking illustration of this is found in the history of two cases which were tried in the southern district of New York. It had been held by the courts there that a corporation organized for saving vessels, and paying its men wages which did not vary with the service performed, could not be salvors. The decision was overruled by the supreme court: see *The Morning Light*, 6 Blatch. 154; *The Camanche*, 8 Wall. 448. In the mean time, two more cases of the kind had arisen in that district, and Judge Blatchford, refusing salvage, had allowed to the corporations what he called a liberal allowance for work and labor: *The J. F. Farlan*, 3 Bened. 206; *The Stratton Audley*, id. 241. When these cases were reviewed in the circuit court, the decision of the supreme court had reversed the rule on which they were avowedly decided; but Judge Woodruff, nevertheless, affirmed the decrees, as having awarded a sufficient salvage: *The J. F. Farlan*, 8 Blatch. 207; *The Stratton Audley*, id. 264. That affirmation was wrong, unless Judge Blatchford had in fact, though not in name, given salvage. And such I suppose to be the case. He spoke of a liberal compensation; but liberality is salvage: there is no place for liberality in an action of contract. The circuit court in effect decided in those cases that salvage performed by means of towage in the harbor of New York should be compensated without any close attention to the amount saved, but rather as a liberal and enlarged compensation for work and labor. We are told by the privy council that value is never wholly lost sight of in these cases: *The Amérique*, L. R. 6 P. C. 468; and this is true; for the salvage for a small

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vessel might be much less than the worth of the time and labor employed; and, in a case precisely like this in other respects, if only \$500 had been saved, no one would expect my decree to be what it will be in this case. The essential difference in assessing damages in contract and in salvage is, that in the former nothing can be considered but the means employed; in salvage, even when the value saved is left out of account, or nearly so, the general results are quite as important as the means used to accomplish them.¹

That the City of Valparaiso was in need of assistance, and that it was highly desirable that she should not lie on that shore beyond high water, was and is clear; more so, perhaps, since the amount of injury which she suffered has been found out than it was at the time. I should consider that her master and her owner, who was on board and was insured, had incurred a grave responsibility if they had not accepted assistance. If she had lain there twelve hours, no one will venture to say what the damage would have been.

When, therefore, some of the witnesses say that they do not think she was in peril, all they can mean is, that they believe she would have come off without assistance, not that her position, in itself considered, was not perilous. The weight of the evidence is, that by carrying out anchors and hauling on them with her winches, which were worked by steam, she could have applied as much and even more power in the general direction in which the tugs furnished it. But I have heard no witness say that this operation could have been successfully performed before high water; and I very much doubt it. High water was so near, that the witnesses dispute whether it had been actually reached or not when she came off; and that carrying out anchors would have been a slower work than hitching on a tug needs no testimony.

Most of the work was done by the steamer's engine, and by the large tug which makes no claim here. That which the libellants did appears to have been useful, and, I am inclined to think, essential to the rescue at that time.

¹ For the sense in which contract and salvage are contrasted with each other, see *The Louisa Jane*, ante, p. 295.

Ex parte Trafton. — Re Trafton.

I have looked at many of the cases besides those already cited, to see how much has been given under various circumstances more or less like these. As well as I can estimate the intent of the courts, it has been to give to tugs what will be a handsome gratuity, enough to induce prompt and even eager assistance; and this would be enhanced slightly by a great value at risk, though in no important or definite proportion to value.

Taking all these circumstances into view, and intending to be liberal, I award

To the Macy \$800, to the Woolley \$400, and costs.

Ex parte TRAFTON. — Re TRAFTON.

NOVEMBER, 1876.

The word "creditors," in the section of the bankrupt act relating to composition, means all whose debts are provable in bankruptcy.

A mistake, without fraud, made by the debtor in his statement of the amount due to a creditor will not vitiate a composition.

The true amount of a disputed claim may be proved by the creditor.

The court may provide for an unliquidated claim in composition cases, as if the case were in bankruptcy, by permitting the prosecution of a pending action in the State court, or by ordering an inquiry in the matter at the bar of the court of bankruptcy.

BANKRUPTCY. — COMPOSITION. — The bankrupt, having offered a composition of twenty per cent to his creditors, now informs the court by petition that Charles F. Roberts claims a considerable sum as due to him, which the bankrupt wholly denies. He has placed the name and residence of Roberts on his list, but with a statement that he disputes the whole claim. An action is pending between the parties in one of the State courts upon this alleged debt; and the prayer is, that the bankrupt may have thirty days after the determination of that action in which to tender twenty per cent of the amount therein ascertained to be due to Roberts, if any thing; or that Roberts be required to come into this court and prove his claim, or for other relief.

G. R. Fowler, for the bankrupt.

B. D. Washburn, for the creditor.

Ex parte Trafton. — Re Trafton.

LOWELL, J. The composition act says that any bankrupt may propose a composition to his creditors, and that he must state their names, residences, and the amounts due them, and that the composition, if duly accepted, shall be binding on all the creditors whose names and addresses, and the amounts due them, shall be stated, and shall not affect or prejudice the rights of any other creditors.

Creditors here plainly means all who have debts provable in bankruptcy; and there is express provision that in bankruptcy, unliquidated demands, and those which are disputed, may be proved after being liquidated or ascertained either in the courts of bankruptcy or in the State courts; and, if in the latter, no execution shall issue on the judgment until the question of the discharge of the bankrupt is decided. The provisions for composition seem to take for granted that a debtor will be able to state the amount due to each creditor; but this is impossible in a case like that now before me, and the question is, whether disputed claims are to share in a composition. I say that this is the question, because it is impossible to admit that if the debtor does all he can, by putting down the name and residence of the person who alleges himself a creditor, it shall be optional with the latter to come in or not, as he chooses. No doubt, this is his privilege, if his name is omitted altogether, because the debtor cannot object to any creditors sharing with the others; but this option arises out of the default of the debtor in omitting the name. When he has made no omission, the debt is either provable or not provable, and, if provable, there seems to be ample power given to the court to enforce the composition and to arrive at the amount due.

My opinion is, that if any thing is due on a disputed claim, it is provable. If it be not so, no debtor whose liabilities are unliquidated to any important extent can make a composition. The law says that the amount shall be stated. But suppose that without fraud there is a mistake in the amount given. Does this vitiate the composition? I think not. The creditor has a right to come in and prove the true amount, and, if he fails to do so, it will be for the State courts to say whether he is bound by the composition; but I do not see how they can draw any very sharp

Ex parte Trafton. — Re Trafton.

line, except at fraud. Under an insolvent debtors' law in England, it was held that the creditor might sue for the difference between the debt stated and that actually due.

If this is so, then the amount is not so essential to the matter as the name and residence, giving the opportunity of correction ; and the clear intent, that all creditors are to be treated alike, must somehow or other be worked out for both parties, whichever may, in the particular case, be the one who desires to have the law put in operation.

In the cases which have arisen heretofore this has been taken for granted, and counsel have agreed upon a mode of liquidation. In one case they prosecuted a pending action, and in another they agreed the facts and submitted the law to me. And it seems to me they were right. The law intends that the debtor's statement should be as accurate as he can fairly make it, but not, on the one hand, that a creditor should be bound by the statement, nor, on the other, that the debtor should be obliged, at his peril, to admit a debt to be due which he truly believes he does not owe ; or that a creditor who has a dispute with his debtor should be put in the position, so much better or worse, as may happen, that he is not to be considered a creditor, and must take his chance against the future acquisitions of the bankrupt for the collection of his debt. This would open a door to all sorts of evils, which would result in the end in a virtual abrogation of this mode of settlement.

The bankrupt law shows how this may be done : either by permitting a pending action or suit to be prosecuted to judgment, in order to ascertain the amount, or by ordering an inquiry at the bar of the bankrupt court in the matter.

My order is that Roberts have leave to prosecute the action now pending against Trafton to judgment, in order to ascertain the amount due him ; but that he take no execution on such judgment as he may obtain until the further order of this court. If he shall elect to discontinue that action, he may apply to this court to ascertain the amount due him. *So ordered.*

THE FANNY.

NOVEMBER, 1876.

Libels or petitions against a vessel are heard by a court of admiralty in any order in which they are brought up.

Until all libels and petitions have been heard, the proceeds are not distributed except to those who have an undoubted priority, such as seamen and salvors; and this not without notice to all others. One who obtains the first decree has no priority over others whose liens are in themselves of equal degree with his.

If there has been a break, such as a voyage, between the times of supplying the vessel, those who supplied the last voyage have precedence over those who furnished an earlier outfit.

LOWELL, J. This steamboat was arrested in August, 1876, and has been condemned and sold to meet a small demand for salvage; and from her proceeds in the registry the salvage and wages have been paid. There remains a sum insufficient to pay in full two demands for domestic repairs, both of which are admitted to be due. Dolbeare & Co. furnished repairs in April and May, 1875, and Eldredge in July, 1876. Both took the requisite steps to record and recover upon their liens as provided by the statute of Massachusetts. Eldredge filed his libel against the vessel before she had been sold, and a decree was entered for him for debt and costs, but has not been paid. Dolbeare & Co. filed their petition some time after the libel of Eldredge, and after the decree in his favor. The question is how the insufficient proceeds are to be marshalled.

The general rule in admiralty is that all lien-holders of like degree share *pro rata* in the proceeds of the *res*, without regard to the date of their libels or suits, if all are pending together. It appears, however, to be the practice in England to give priority to a plaintiff who has pursued his remedy with such diligence as to obtain a decree, before another, holding a debt of equal or even higher degree, has moved the court for an order governing the distribution. The leading case is *The Saracen*, reported 4 Notes of Cases, 498, 2 W. Rob. 453, and on appeal, 6 Moore, P. C. 56, 75. In that case, the owners of a ship, and of part of her cargo damaged or lost by collision, brought their action and obtained an interlocutory decree for the damage and a reference to ascertain the amount. On the day this decree was pronounced the owners of the remainder of the cargo brought their action. The

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courts decided that the interlocutory decree was a judgment, and, by some not very intelligible analogy to the distribution of the assets of a deceased person, a judgment was regarded as converting the debt into one of a higher nature than it was before. There was in that case the difficulty that the first plaintiff had a bond, and the second could not share in the benefits of that security; so that what the court was asked to do was to pronounce for a part of the damage in each case, the whole damage being more than the value of the vessel proceeded against and her freight. They decided that the court of admiralty could not work out the equity of the statute limiting the liability of ship-owners; and this decision amounts to saying that the libellant who can first reach the proceeds shall satisfy his own debt, whatever becomes of the others, and that only a court of equity can regulate the equitable distribution. It must be observed that Dr. Lushington has twice expressed the opinion that this rule is unsatisfactory, and not to be extended; and in one case he refused to apply it to a decree which was not technically final, though as much so, apparently, as those which were called so in some of the earlier decisions: see *The Clara*, Swabey, 1; *The Desdemona*, id. 158.

The reasons for the rule are not applicable to this country, where our courts of admiralty do work out the limited liability, and where debts by specialty have no precedence over others. The rule has not been adopted in this district, and I do not suppose that it has been in any other: see the elaborate opinion of Judge Hall and the cases cited by him in *The America*, 16 Law Reporter, 264. Judge Sprague has, to my knowledge, decided that the order in which the libels are brought is immaterial; and this was agreed by counsel to be undoubtedly sound. When a vessel is seized here, and not bonded, our practice is to hear the libels or petitions in any order in which they are brought up, but not to distribute the proceeds until all have been heard, unless to those, such as the salvors and seamen, who have, by the nature of their claims, an undoubted priority; and even this is not done without notice to all others. The libellant who has pursued his remedy with diligence before others are brought forward may have priority for his costs; and that is as far as justice or sense will admit of an advantage to him.

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Between these material-men, what is the rank of their liens? Counsel on both sides inform me that the statute of Massachusetts does not deal with this question, and I have not looked at that law. In admiralty, the rule is that liens take rank in the inverse order of their dates: first, recent salvage; next, wages of the current voyage; next, bottomry of that voyage; and so on, backwards. This reverses the ordinary practice of marshalling in matters of title. But the reasons for our rule are sound. "In the hazardous trade of the sea," says a learned writer, "the services performed at the latest hour are most efficacious in bringing the vessel and her freightage safely to their final destination. Each foregoing incumbrancer, therefore, is actually benefited by means of the succeeding incumbrance, and the equity of the court of admiralty, in adjudicating cases of conflicting liens of this nature [*ex contractu*] takes that as the principle of its decisions." 49 (Lond.) Law Mag. 146.

Another reason, perhaps, was that a creditor of this kind, his lien being secret, holds out the vessel as a fit subject for services which will create liens. But the controlling consideration is the necessities of commerce which have given to salvors and material-men the right to an interest in the thing saved or benefited, to whomsoever the benefit may accrue, just as seamen cannot be postponed to the most meritorious mortgagees, no matter what misfortune has prevented them from taking possession of the ship and controlling her navigation.

Concerning material-men, I have found but few decisions; but the analogy of bottomry bonds is reasonably close, that where repairs are furnished at different times, the last man is presumed to have added a value to the thing which was subject to liens, which he may therefore realize before those earlier liens are paid, — I mean, when a voyage or part of a voyage has intervened, — for repairs put on in a port during one stay of the vessel there, would usually be contemporaneous in the sense of the law.

One other point is taken. It seems that Dolbeare & Co., pursuing their remedy under the State statute, took a bond with sureties for the payment of their debt. The statute says that such a bond merely releases the vessel from custody, and shall not discharge the lien. The point taken by Eldredge is that Dolbeare

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should look to his bond, and leave the fund free for him. This would be so if the sureties were secured by property of the ship-owner ; but of this there is no evidence. As mere sureties, they have an equity of subrogation to the creditor's lien, which balances and renders nugatory the right in equity which Eldredge might have, to insist that Dolbeare has two funds. He has not two funds of the debtor ; but one of the debtor, and one of a person who, in equity, can require him to look to his lien as far as it will go, in exoneration of the surety. This is one reason, I suppose, for the statute provision that the lien shall not be lost. The point, however, is not necessary to the decision, because I have given precedence to Eldredge for other reasons. Fortunately, his debt is very small, and most of the remaining proceeds will come to Dolbeare & Co. after all.

Decree that Eldredge's lien has precedence, and the amount awarded him is to be paid, and the remaining proceeds to Dolbeare & Co., unless there are other petitions not yet heard.

H. H. Mather, for Dolbeare & Co.

H. P. Harriman, for Eldredge.

C. W. WILKINS v. G. P. DAVIS.

NOVEMBER, 1876.

If a member of a firm obtains his discharge in bankruptcy, he is released from liability for his joint as well as his separate debts.

The partners of the bankrupt are bound by the discharge as well as the joint creditors.

A joint creditor may prove against the separate estate of the bankrupt, and may vote for assignee, examine the debtor, and object to his discharge. He cannot compete with the separate creditors in the distribution of separate assets, but will receive dividends from any joint assets which the assignee may obtain, and from any surplus of the separate assets after the separate debts are paid.

The bankruptcy of one partner, *ipso facto*, dissolves the partnership, and the assignee is tenant in common with the solvent partner in the joint stock.

A court of equity may give either the solvent partners or the assignee the settlement of the joint affairs.

The assignee may recover at law or in equity, as the nature of the case requires, from a solvent partner what is due from him by the articles of copartnership.

A statute of Massachusetts provides that limited partnerships may be conducted in the name of the general partner, and that the special partner shall be responsible

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for the capital contributed by him ; and if, at the termination of the partnership, the assets are not sufficient to pay the partnership debts, he shall be responsible for all sums drawn out by him, with interest. A general partner in such a firm became bankrupt, with assets insufficient to pay the joint debts. *Held*, that his assignee could recover from the solvent special partner the sums withdrawn by him during the continuance of the firm.

Nutting v. Ashcroft, 101 Mass. 800, considered.

BANKRUPTCY OF ONE PARTNER. — Action of contract by the assignee in bankruptcy of the estate of C. W. Eaton to recover \$3,545.49, alleged to be due from the defendant. The parties waived a trial by jury, and submitted the case on the facts, agreed to be thus: The bankrupt and the defendant were associated in a limited copartnership in the clothing business, which was to have terminated Oct. 11, 1875; the bankrupt was the general partner, and carried on the business in his own name; the defendant was the special partner, and contributed the whole capital in cash; during the continuance of the firm he drew out, as interest on his capital, the sums sued for in this action; the general partner became bankrupt in July, 1875, the unpaid joint debts exceeding the value of the joint assets by more than \$3,500. Eaton, in his petition, described himself as a member of the firm, but asked for no decree against the defendant or the firm; and none was made. No notice of the petition was given to the defendant; and the assignment to the plaintiff did not mention joint property, but was in the usual form (No. 18), and included "all property of whatever kind, of which he [the bankrupt] was possessed, or in which he was interested, or was entitled to have," on the day the petition was filed.

The General Statutes of Massachusetts, ch. 56, § 8, provide that during the continuance of a limited partnership no part of the capital stock thereof shall be withdrawn, nor any division of interest or profits be made, so as to reduce the capital stock below the sum stated in the certificate which the law requires to be made and recorded; and that if, during the continuance or at the termination of the partnership, the property or assets are not sufficient to pay the partnership debts, the special partners shall severally be held responsible for all sums by them in any way received, withdrawn, or divided, with interest. The fourth article of the agreement between the parties provided that they should

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divide profits and losses in the proportion of seventy-five per cent to and by the special partner, and twenty-five per cent to and by the bankrupt, except that in no event should the defendant lose more than the capital contributed by him and interest thereon, and the sums he may have withdrawn from the firm. The joint assets were included in the bankrupt's inventory, and had come to the possession of the assignee. The joint creditors had proved their claims.

J. R. Bullard, for the plaintiff.

B. L. M. Tower, for the defendant.

LOWELL, J. I understand the defendant to admit that by the law of Massachusetts, as applied to the facts of this case, he is liable for the sums mentioned in the declaration, but to deny that the assignee has any interest in them. It has been announced of late, chiefly in *dicta*, that all the members of a firm must become bankrupt, in order that the assignees should be able to deal with the joint stock, or that a discharge should be obtained from joint debts: *Re Littles*, 1 N. B. R. 341; *Re Wickens*, 2 id. 349; *Hudgins v. Lane*, 11 id. 462. Such, however, is not the law, as I understand it.

1. It has been settled for more than a century and a half, that, if one member of a firm becomes bankrupt and obtains his discharge, he is released from all his debts, joint and separate: *Ex parte Yale*, 3 P. Wms. 24, note *a*. This leading case is the law of England to-day:¹ it has not been necessary to reaffirm it often; but the doctrine has been acted on and applied in various ways. Where the bankrupt was a member of a company which was for some purposes a partnership, the court extended the rule to him: *Thomson v. Harding*, 8 C. B. N. S. 254. So the proceedings and pleadings in such cases have repeatedly recognized the law that one partner is discharged by his separate certificate; such as *Bovill v. Wood*, 2 Maule & S. 23; *Noke v. Ingham*, 1 Wils. 89; *Booth v. Middlecoat*, 6 Bing. 445. In this last case, it does not distinctly appear whether the bankrupt was a partner or a joint contractor; but the very absence of information upon the point shows it to be immaterial: see *Lindley, Partn.* 1027 (2d ed. 1197); *Collyer, Partn.* (5th Am. ed.) § 858; *Mont. & Ayr., Bank-*

¹ *Ex parte Hammond*, 21 W. R. 865.

rupt Law (2d ed.) 748; 1 Deacon, id. 797; Robson, id. (2d ed.) 554 (3d ed.) 596. If a creditor who had proved his debt against a bankrupt partner brought an action at law against the solvent members of the firm, and joined the bankrupt as a defendant, which at law he was bound to do, for reasons not now necessary to be stated, yet the lord chancellor would require him to give security to the bankrupt against all damages and costs: *Ex parte Read*, 1 Rose, 461; *Ex parte Stanton*, 1 M., D. & DeG. 273; *Ex parte Mills*, L. R. 6 Ch. 594.

Not only will the joint creditors be barred, but the bankrupt's copartners equally; because they may pay the joint debts, and prove against the bankrupt's estate the equitable debt arising from any deficiency in his account: *Wood v. Dodgson*, 2 M. & S. 195; *Affalo v. Foudrinier*, 6 Bing. 309; *Butcher v. Forman*, 6 Hill, 583. I have had such cases.

That a joint creditor can prove under a separate bankruptcy, and will, therefore, be bound by the discharge, is fully admitted in the United States. The early case of *Tucker v. Oxley*, 5 Cranch, 34, went beyond this, and has been modified; but the general proposition laid down by the court, that such a debt is provable, has never been impugned. It is recognized in our statute, § 5118: "No discharge shall release, discharge, or affect any person liable for the same debt for or with the bankrupt, either as partner, joint contractor, or otherwise." Of similar language in the act of 1800, Marshall, C. J., said, that it removed all doubt on the subject: 5 Cranch, 40; and the authorities are as decisive as the argument. The fact that joint creditors cannot prove *against the separate estate* might mislead a careless reader of some of the cases into an impression that they could not prove at all; but the true rule is that they may prove, and may vote for assignee, and be heard on the discharge, and examine the debtor, and share any joint assets or any surplus of the separate assets: *Heath v. Hall*, 4 Taunt. 328; *Ex parte Crisp*, 1 Atk. 133; *Crispe v. Perritt*, Willes, 467; *Ex parte Farlow*, 1 Rose, 421; *Ex parte Elton*, 3 Ves. 238; *Wilson v. Gompartz*, 11 Johns. 193; *Barclay v. Phelps*, 4 Met. 397.

2. It is equally well settled, and is a necessary part of the theory, that the bankruptcy of one partner dissolves the part-

nership, excepting for the purpose of closing the joint affairs, and that the assignee is tenant in common with the solvent partner of the joint stock. It usually happens that the latter will be in possession of the stock, and this will not be disturbed, excepting for good reasons; and, on the other hand, if, as in this case, the assignee is in possession, that will not be disturbed without good cause. A court of equity has undoubted power to intrust either the solvent partner or the assignee with the exclusive control of the settlement; but if no order is made, the assignee having possession will go on and collect the joint assets, and pay the joint debts, by way of dividend, to those creditors who come in and prove: see *West v. Skip*, 1 Ves. Sen. 239; *Dutton v. Morrison*, 17 Ves. 198; *Murray v. Murray*, 5 Johns. Ch. 60; *Parker v. Muggridge*, 2 Story, 384; *Ayer v. Brastow*, 5 Law Reporter, 498; *Amsinck v. Bean*, 22 Wall. 395.

It is argued that the assignee of one partner cannot interfere with the affairs of the firm, unless the decree of the court expressly confers upon him such a right. But no such point was taken in any of the cases above mentioned. On the contrary, the facts in all of them simply show that one partner was bankrupt. This, of necessity, disposes of all his property; and one part of that is his interest in any firm, or any number of firms, of which he was a member. It seems to be thought that one may be bankrupt and not bankrupt at the same time: bankrupt as an individual, and not so as member of a firm. This is impossible. A man may be bankrupt when the other members of his firm are solvent, and when the joint assets are in excess of the joint debts, because he may owe separate debts beyond the amount of his separate property added to his share in a solvent joint business. I have had such a case; and the assignee very properly made a settlement with the solvent partner, by which the joint debts were paid by the latter, and the value of the bankrupt's interest in the firm was paid over to the assignee for distribution among his separate creditors. If the balance had been against the bankrupt, the solvent partner, upon paying the joint debts, could have proved for it, and have received a dividend from the separate estate, as I have already shown. But the partner would be no less bankrupt in either case, and his assignee would have no

other or different title, so far as his estate was concerned, than if all the members of the firm were bankrupt; though, of course, the settlement would be much easier with an entirely solvent partner than with one who was embarrassed, though not bankrupt; and the assignee might be obliged in the latter case to take upon himself a large part of the settlement of the joint affairs, or the whole of it, under the direction of a court of equity.

It is said that some of the remarks of the learned judge who delivered the opinion of the court in *Nutting v. Ashcroft*, 101 Mass. 300, assert that the assignee of the general partner acquires no interest in the joint stock, unless the firm is adjudged bankrupt after notice to the special partner. Those observations were not necessary to the decision, which was that the assignee of one partner could not sue the other partner in trover for joint stock. I can see no propriety in notifying a solvent partner of the petition of his copartner, nor any standing he would have to oppose or assent to the decree. Nor is it proper or lawful to adjudge a firm bankrupt which consists of a bankrupt general partner and a solvent special partner, nor is it material whether the firm, as such, is able to pay all its debts or not. The decree against the general partner necessarily includes his interest in the joint stock, for the simple reason that it is his. If it were not so, he might obtain his discharge, and then pocket his share of the surplus of his solvent joint business, if it happened to be solvent, leaving his separate creditors discharged, but not paid, an injustice which the law does not permit. *Nutting v. Ashcroft*, *ubi supra*, appears to have been argued for the plaintiff on the assumption that the assignee of a general partner succeeds to his sole right to manage the joint affairs; which cannot be admitted. The bankruptcy dissolves the partnership, and I suppose the solvent special partner has the same right to wind up the affairs which a general partner would have, which is, to deal with such joint stock as he happens to have in his possession, with a like right in the assignee of the special partner, subject, as to both, to the decree of a court of equity, if applied for and necessary. This being so, the *decision* in *Nutting v. Ashcroft* was clearly right, because the action was

trover, and neither tenant in common can maintain that action against the other ; but the reason given, that the bankrupt had not assigned his interest in the joint stock, I cannot assent to : it contravenes all the cases above cited, is inadmissible in principle, and contrary to the very words of the assignment which conveys all his estate.

A rule of this court, as of several other district courts, requires the bankrupt to include his joint creditors in his schedules, in order that they may be notified and may prove their debts, and share in the joint assets and in any surplus of the separate assets, and exercise the right of examination, &c., as they may be advised. All this has been done here ; and, besides, the inventory includes all the joint assets, because they were all in the hands of the general partner. If they had not been, he would merely have said, " My interest in such a firm, the joint property being in the possession of my partner B." His assignee's title would be the same in either case, though his right of possession would not.

3. The remaining question is, whether an action at law in the nature of assumpsit will lie to recover the sums which the special partner had drawn out while the firm was going on. The statute says that he shall be responsible for them, but does not say to whom. The articles of copartnership follow the statute to the extent of three-quarters of the losses. I suppose it to be clear that if the general partner had remained solvent, but the joint business had been unsuccessful, so that these sums were needed to make good the defendant's share of the loss, the general partner, if he had paid all the joint debts, and there were no question of accounts, could, by the law of Massachusetts, have maintained an action at law for this amount. If partnership accounts were to be settled, the general partner must go into equity ; and if he refused to bring such a suit, and had not paid the joint debts, the creditors might bring one. So far, I apprehend, there is no dispute. If, the general partner remaining solvent, only a part of these sums were necessary to make up the defendant's share of loss, whether the creditors could compel him to pay them, without first resorting to the solvent partner, I do not know ; but as they must join both part-

ners in a suit in equity, the court could regulate that matter. The assignee, who succeeds to the rights of the general partner, might, undoubtedly, in some form of suit, oblige the defendant to make good whatever the partnership articles call for, which is three-quarters of the losses; and, upon the whole, I am of opinion that he can, upon some terms, represent the creditors likewise, and sue for the other quarter part. If the whole sum is clearly and admittedly requisite to make up the capital, according to the statute, the assignee may maintain an action at law for its recovery; if there are disputed accounts, he must proceed in equity.

If a corporation is bankrupt, and the shareholders are liable to definite assessments, which the corporation had the power to lay, the assignee may lay them, under the direction of the court, and may recover the amounts of the shareholders. If, on the other hand, the right of recourse against shareholders is given to the creditors independently of and adversely to the corporation, and especially if the creditors must work out their rights by a bill in equity, and different creditors have different rights depending upon the date of their debts, or upon estoppels applying only to a part of them, it might be impossible that all these equities could be worked out through the assignee. The authorities upon this point are not very clear; but I take the law to be that the assignee has all the rights and powers which are given to the whole body of creditors, or to the whole of any one class of creditors, whether at law or in equity, and may maintain any suit for which, for instance, a general creditor's bill would lie, and this exclusively of the creditors themselves.

In this case, the assignee has all the assets. No application has been made to this court in equity to restrain his proceeding; no objection is taken to it: he can and will distribute all the apparent assets; and I see no objection, and can think of none, to his recovering those he now sues for. In an ordinary case, the assignee must join the solvent partner as a plaintiff in a suit for assets; but here the defendant is the solvent partner; and either the assignee may maintain a suit, or it must be left to a creditor's bill, to which the assignee must be a party on the one side or the other, in order that he may show whether these sums are

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necessary to make up the deficiency, and that he may protect the interests of the separate creditors. It will be observed that the court of bankruptcy has full power to impose upon the assignee any terms, such as giving bond, that may be necessary to secure the rights of all parties.

If no order of this kind is asked for, the entry will be

Judgment for the plaintiff.

Ex parte FITZ. — Re RAWSON & AL.

NOVEMBER, 1876.

By the law of Massachusetts, a bill of sale intended for security operates as a pledge and not as a mortgage, and does not require, or admit of, registration. Delivery to the pledgee may be either actual or constructive. Possession may be kept by an agent, and that agent may be the pledgor.

LOWELL, J. The petitioner lent money to Rawson & Hittinger, and took from them at the same time the notes of Jacob Hittinger, not a member of the firm, and bills of sale of certain locomotive engines, then in their machine-shop in Cambridgeport, as additional security. Rawson & Hittinger have become bankrupt, and Jacob Hittinger has paid the debt; and the petitioner, acting as trustee for him, asks that the engines or their proceeds be now applied to pay the debt. Jacob Hittinger has become a party to the petition, and submits his rights to the determination of the court.

It was argued in behalf of the petitioner that the bills of sale were mortgages, and that the failure to record them would not, under the circumstances of the case, be fatal to the title of the mortgagee. I take it, however, to be clear, that, by the law of Massachusetts, as of the other States, the bill of sale, intended for security, operated as a pledge and not as a mortgage, and neither required nor admitted of registration: *Walker v. Staples*, 5 Allen, 34; *Kimball v. Hildreth*, 8 id. 167; and, incidentally, *Newton v. Fay*, 10 id. 505; *Drake v. White*, 117 Mass. 10. As a general rule, the pledgee must take and keep possession of the chattels, or his title will not be valid against the assignee in

bankruptcy. My decision, that a mortgagee had a better title than the assignee in some cases, though he neither took possession nor recorded his mortgage, does not apply to pledges, but turned on the words of a statute, construed with the aid of the rule of the common law of Massachusetts, that the possession of a mortgagor is consistent with the title of the mortgagee. Still, on the question of what is a sufficient taking and keeping, the cases arising under mortgages are in point.

I understand the law to be that there must be a delivery before the pledgee's lien will attach; but the delivery may be either actual or constructive: *Meyerstein v. Barber*, L. R. 2 C. P. 38, 661; 4 H. L. 317; *Young v. Lambert*, L. R. 3 P. C. 142. Then, as to keeping possession, it may be kept by an agent, and that agent may be the pledgor. If the circumstances make out a good reason for giving the custody and apparent control to the pledgor, there may not even be evidence of fraud; but, at most, his possession will only be evidence either that the pledge has been abandoned, or that the transaction is covinous: see *Sumner v. Hamlet*, 12 Pick. 76; *Macomber v. Parker*, 14 id. 497; *Hays v. Riddle*, 1 Sandf. 248; *Way v. Davidson*, 12 Gray, 465; *Cooper v. Ray*, 47 Ill. 53; *Martin v. Reid*, 11 C. B. N. S. 730; *Thayer v. Dwight*, 104 Mass. 254; *Thorndike v. Bath*, 114 id. 116; *Weld v. Cutler*, 2 Gray, 195.

On the question of fact, whether possession was taken and kept, there is, unfortunately, a direct contradiction between the only two witnesses to the acts done. The petitioner testifies that, soon after the bills of sale were given, he went to the shop of the pledgors, and in presence of one of them, Michael Hittinger, took possession of every one of the engines, put his hand upon each, and told Michael Hittinger to hold them as his agent, and that if any of them were sold he would give an order for the delivery. Michael Hittinger says that the petitioner came over to the shop, and one engine was pointed out to him, but he did nothing about taking possession, and gave no orders. Supposing, as I do, that the witnesses are equally veracious, I feel bound to give greater credit to the evidence of the petitioner; because he cannot be mistaken, and Mr. Hittinger may have forgotten the circumstances. The petitioner went to the factory, according to

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his story, with a definite purpose, and must recollect what it was, and what he did in pursuance of it. Both stand before the court unimpeached, and with no serious bias, because the debt has been paid to Mr. Fitz, and he is proceeding for the benefit of a surety; and Mr. Hittinger, on his part, has assigned all his title by his petition and the proceedings in bankruptcy. I can only regret that the parties did not see fit to submit the decision of this question to a jury.

Taking it, as I feel bound to do, that Mr. Fitz's recollection is the more accurate, it seems to me, as matter of law, that his possession was sufficient. I do not consider that a pledgee is bound to remove locomotive engines, and put them into his house or into a warehouse. He might well leave them with the pledgor, to be finished, or even to be sold. There is somewhat more danger of fraud if the pledgor himself is intrusted with the possession, than if a third person was employed; but there is no difference in principle between the appointment of Hittinger and of one of his clerks. It comes back to a question of fraud or good faith. Of course, it is well understood that an assignee in bankruptcy is not a purchaser without notice.

It is argued that there was no sufficient designation of the particular engines pledged. I do not understand the evidence to be undisputed on this point. Mr. Fitz said that the engines mentioned in his bill of sale could be easily picked out from the others; and Mr. Hittinger again differed from him on this point. But this matter is set at rest by the evidence, which I have accepted as accurate, that each engine was in fact designated and pointed out when Mr. Fitz went over to the shop and took possession, which was long before the bankruptcy.

Petition granted.

R. D. Smith, for the petitioner.

T. F. Nutter, for the assignee.

Ex parte Rockett. — Re Taylor.

Ex parte ROCKETT. — Re TAYLOR.

NOVEMBER, 1876.

A person employed for a temporary service, in adjusting the books and accounts of a bankrupt, within six months before the bankruptcy, has a privileged debt against the estate for services as clerk to the extent of fifty dollars, under § 5101, Rev. Sts.

LOWELL, J. Rockett proved a debt at the first meeting for seventy-five dollars due him as an "expert." At the second meeting he asked to have fifty dollars of the amount put upon the footing of a privileged debt, alleging the services to have been those of a clerk. The assignee objected to this, and the register certifies the question, at the request of the parties. The evidence consists of the examination of the creditor himself, in which he says that he is an expert in book-keeping, and was employed by the bankrupt to straighten out his books, for seventy-five dollars, if the time employed was less than two weeks, which it was. He adds: "I examined his day-book, his cash-book, went over his ledger account, went over his personal and private affairs, correspondence, and all matters pertaining to his business, and found out how he stood." The services were rendered within the time mentioned in Rev. Sts. § 5101, and the doubt is whether the moneys due are "wages due to any . . . clerk" for labor performed within that time.

The courts have construed such statutes liberally in favor of the privilege. In *Thayer v. Mann*, 2 Cush. 371, a manufacturer furnished the materials, which the petitioner took home, and he and his wife made the boots, at so much a pair; the petitioner was held to come within the description of "any person who shall have performed any labor as an operative in the service of the insolvent." So when the law of England gave a preference to clerks and servants, though not, as the courts construed the act, to ordinary workmen hired by the week, it was held that the mate of a ship was a servant of the master, who was a part owner: *Ex parte Homborg*, 2 M., D. & DeG. 642; and that the city editor of a newspaper was a servant of the proprietor: *Ex parte Chipcase*, 11 Weekly R. 11; and the commissioners held

Ex parte Whitcomb. — Re Colwell.

that a commercial traveller was a clerk of the trader for whom he travelled, and the vice-chancellor affirmed the decision; but whether he considered the petitioner to be a clerk or a servant is not reported: *Ex parte Neal*, Mont. & McA. 194.

In this case, I infer, from the brief statement of it which is before me, that the bankrupt, finding his affairs somewhat involved, and having been his own book-keeper, called in the petitioner, as a person of experience in such matters, to put his accounts into a presentable and intelligible shape, for his own information, and for bankruptcy, if that should become necessary, or for the inspection of his creditors. The work was that which the head clerk of any large house would do as matter of course, in the ordinary line of his duty: it was the work of a clerk, though of one who was only engaged for two weeks, and for this single occasion. If the petitioner had not called himself an expert, and had not made out his bill for "advice and assistance," the nature of his service would have been more readily seen. I think it comes fairly within the true meaning of the statute, reasonably and liberally construed, and that without departing in the least from the ordinary meaning of the words employed.

The question whether Rockett has a priority to the extent of fifty dollars is answered in the affirmative.

Ex parte WHITCOMB. — Re COLWELL.

NOVEMBER, 1876.

By sect. 5099 of the Revised Statutes, the allowance of a reasonable compensation to an assignee for his services is within the discretion of the court of bankruptcy, and cannot be wholly regulated beforehand by the supreme court. This discretion is given to the court only, and not to the registers.

Assignees, intending to charge for services, beyond the fees mentioned in rule 30, must notify creditors of their intention in the notices of the meeting at which their account is to be presented.

LOWELL, J. Two charges in the assignee's account are objected to: one, of \$275, for his own services in superintending the manufacture of the unwrought stock of shoes in the bankrupt's

Ex parte Whitcomb. — Re Colwell.

factory, under an order of court authorizing the business to be carried on in accordance with the act of 22d June, 1874; the other, of \$300, for money paid his counsel for advice in the settlement of the estate.

The evidence upon the first item is that the assignee is a manufacturer, acquainted with the business which was to be carried on, and that he took the superintendence of it, and gave his time and attention to it, and succeeded in realizing for the creditors considerably more than would probably have been obtained in any other way. He has charged five dollars a day for fifty-five days. On the other hand, it is said that the bankrupt was employed as a foreman at the factory, and was competent to do all that the assignee did, and that the latter was, in fact, a supernumerary. Upon the whole, I think the assignee may fairly charge for fifty days' work, if any such charge is admissible by law. Rule 80 of the supreme court enacts that no allowance shall be made to an assignee other than the commissions on the money received and paid out, and only once on that, excepting as is by said rule specified. The fees therein mentioned do not include any services for superintending or carrying on the business of the bankrupt, which the statute permits to be done in certain cases, with the assent of a majority in value of the creditors. It appears to be a *casus omissus*; and I cannot suppose that the court intended that only the commissions for collecting and disbursing should be paid, when the duties are so very different and so much more onerous than those which are usually performed by assignees. The rule, however, is positive, that no other allowance shall be made; and I do not see how I can change the rule. I must, therefore, decide the question, which I alluded to in a late case, but did not then find myself obliged to pass upon, whether the supreme court has power to say that no other allowance shall be made than is provided by rule 80.

Rev. Sts. sect. 4990, gives the supreme court authority to regulate the fees and charges in all proceedings in bankruptcy; this and all the other powers given by that section are qualified by the opening words of the grant, "subject to the provisions of this title." One of the provisions is, in sect. 5099, that the assignee shall be allowed, and may retain out of the money in his hands,

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all necessary disbursements, "and a reasonable compensation for his services, in the discretion of the court."

I am of opinion that this discretion, given to the court of bankruptcy, cannot be regulated beforehand by the supreme court. Fully impressed with the importance of keeping the charges of assignees within reasonable limits, and ready to exert my authority at all times to repress any tendency to waste or overcharge, I do not feel at liberty to refuse to an assignee a reasonable compensation for his services, if the particular fees enumerated by the supreme court should, in any case, fail to afford him such compensation. The table of fees, as I have said, is made up without any reference to the unusual mode in which this estate was lawfully settled. It gives him something for whatever the supreme court understand to be the usual work which devolves upon him; and I do not mean to say that for these things the supreme court may not prescribe the fees; nor that an assignee's account, charging for what he may call extra or additional services, should ever be allowed as matter of form, or merely because there is no objection made, nor that there will be many cases in which any thing of the sort ought to be allowed. Taking this case alone, and in its peculiar circumstances, I decide that the assignee is to have, for superintending the manufacture, \$250.

I may add here, to save misconstruction, and to put the practice of this district upon a proper footing, that assignees who intend to charge for services beyond the fees mentioned in rule 30 must warn the creditors of the fact in the notices for the meeting at which the account is to be considered; that the registers should examine carefully the grounds and reasons for all such charges, whether objected to or not, and, if they consider that any allowances of that sort ought to be made, should report the same to the court, with their reasons. I am of opinion, as at present advised, that the court only, and not the register, is invested with the discretion given by sect. 5099.¹

I come now to the charge of \$300 paid to counsel. We have been told, and wisely, by a justice of the supreme court, in delivering an opinion for himself and his brethren, that assignees are

¹ See a rule of the supreme court amending rule 30, and passed since this decision was made: 98 U. S. (8 Otto), at the beginning.

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too ready to rush into litigation, and to contest every thing upon which ingenious counsel can raise a doubt; and that their endeavor should be to settle and compound controversies, and to save time and expense, as far as possible. The assignee appears to have acted on the rule thus laid down, and to have escaped litigation; and the objection taken to this item is, that he might have done all this without going to counsel, or to so good counsel. I have not found that the highest charges in these cases have been made by the most competent attorneys; and I see in this case good reason for employing counsel, though it turned out, happily, that no lawsuit was expedient, and that certain investigations, which appeared to be necessary, developed nothing which required action on the part of the assignee. There was, however, reason to investigate, and the creditors would not have been satisfied without it.

Twenty-five dollars are to be deducted from the assignee's charges. The remainder of the account is allowed.

M. Storey, for the objecting creditor.

R. M. Morse, Jr., for the assignee.

Ex parte HEIDELBACK. — Re GLYN.

DECEMBER, 1876.

The rate of interest and damages which the drawee of a bill is to pay *ex mora* is governed by the law of the place where the bill is drawn.

If a bill is made and dated at the business domicile of the drawee, his undertaking is to pay it there, in case of dishonor, though it may have been negotiated elsewhere.

Damages in a case of this sort are a part of the law of the performance, and not of the execution and validity of the contract, nor of the remedy.

Such a question, arising in the courts of the United States, is one of general jurisprudence, and not of local law.

DAMAGES ON BILLS OF EXCHANGE. — The amount of debt which the holders of certain bills of exchange should prove against the estate of the bankrupt was submitted to the court upon agreed facts.

Heidelberg, Frank, & Co., of New York, hold two similar bills, of one of which the following is a copy: —

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£2,500.

Boston, May 6, 1875.

Sixty days after sight of this first of exchange (second and third unpaid), pay to the order of myself twenty-five hundred pounds sterling, value received, and charge the same to account.

CHARLES H. GLYN.

To Messrs. Robert Benson & Co., London.

(Indorsed.)

Pay to Heidelberg, Frank, & Co., or order. Value received.
New York, May 7, 1875.

CHARLES H. GLYN.

Accepted May 18, 1875, at Messrs. Glyn, Mills, & Co.

ROBERT BENSON & Co.

The other holders have bills like this, excepting that the indorsement of Glyn is thus: "Pay A. B. or order, Charles H. Glyn."

The question presented is, whether the interest and damages are to be assessed according to the law of New York or that of Massachusetts.

At the time the bills were drawn, Glyn had an office and did business in Boston, and these bills were written and indorsed in blank by Glyn in Boston, and were by him sent to his agent in New York, who negotiated them to Heidelberg, Frank, & Co., and received the amount of the same, and remitted the same to Glyn.

Heidelberg, Frank, & Co. forwarded the bills to London for acceptance, where they were accepted, and subsequently duly protested for non-payment, and returned to Heidelberg, Frank, & Co.

The words, "Pay to Heidelberg, Frank, & Co., or order, value received, New York, May 7, 1875," were written in New York over Glyn's indorsement at the time of the negotiation of the bills. The bills held by the other petitioners were drawn, indorsed, and negotiated in like manner.

The Revised Statutes of New York, part 2, ch. 4, p. 18, provides as follows: —

"The rate of damages to be allowed and paid upon the usual protest for non-payment of bills of exchange drawn or negotiated within this State shall, in the following cases, be as follows: —

"(4.) If such bill shall be drawn upon any person or persons, at any port or place in Europe, ten dollars upon the hundred, upon the principal sum specified in the bill."

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The General Statutes of Massachusetts provide as follows:—

“ When a bill of exchange, drawn or indorsed within this State and payable without the limits of the United States, is duly protested for non-acceptance or non-payment, the party liable for the contents of such bill shall, on due notice and demand thereof, pay the same at the current rate of exchange at the time of the demand, and damages at the rate of five per cent upon the contents thereof, together with interest on the contents, to be computed from the day of the protest. And said amount of contents, damages, and interest shall be in full of all damages, charges, and expenses. Gen. Sts. ch. 53, § 11.

A. S. Wheeler & C. Demond, for the holders of the bills. 1. A bill or note takes effect as a contract, not at the place where it is written, drawn, or indorsed, but where it is delivered: *Cook v. Moffatt*, 5 How. 295; *Freese v. Brownell*, 35 N. J. 285.

2. The damages to be paid by the drawee depend upon the law of the place of drawing, that is (if we apply the law above mentioned in our first point), the place of delivery and negotiation: *Allen v. Kemble*, 6 Moore, P. C. 314; *Gibbs v. Fremont*, 9 Ex. 25; *City Savings Bank v. Bidwell*, 29 Barb. 325; *Pine v. Smith*, 11 Gray, 38; *Tilden v. Blair*, 21 Wall. 241; *Young v. Harris*, 14 B. Mon. 556; *Depau v. Humphreys*, 20 Martin (La.), 1; *Nat. Bank v. Morris*, 8 Sup. Ct. (1 Hun) 680; *Bank of Georgia v. Lewin*, 45 Barb. 840; *Sylvester v. Swan*, 5 Allen, 134; *Whitten v. Hayden*, 7 Allen, 407; Wharton, Conf. Laws, § 503.

R. R. Bishop & W. S. Hall, for the general creditors. 1. The contract of Glyn was, that if the acceptors did not pay the bills at maturity, he would, on due notice, pay the holder the sum which the acceptors ought to have paid, together with damages, which, in the absence of statute regulation, would be the expense which the holder would incur to indemnify himself at the place of payment with interest: *Suse v. Pomp*, 8 C. B. N. s. 537, 562.

2. The statutes which New York and Massachusetts have made on this subject have no extra-territorial operation, and affect the remedy only: *Ayer v. Tilden*, 15 Gray, 178; *Ives v. Farmers' Bank*, 2 Allen, 236; *Gale v. Eastman*, 7 Met. 14.

3. The courts of the United States sitting in Massachusetts will follow the law of that State in the matter of damages: Rev. Sts.

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§ 721; *Brown v. Van Braam*, 3 Dallas, 344; *Hausknecht v. Claypool*, 1 Black, 431.

4. If not a matter of remedy, still Boston was the place of the contract of Glyn: *Snaith v. Mingay*, 1 M. & S. 87; *Barker v. Sterne*, 9 Ex. 684; *Lennig v. Ralston*, 23 Penn. St. 137.

LOWELL, J. The principles of law upon which this case must be decided have been thus laid down by the supreme court in *Scudder v. Union Nat. Bank*, 91 U. S. (1 Otto) 406. Matters pertaining to the execution, validity, and interpretation of a contract are determined by the law of the place where it is made; those connected with its performance, by the law of the place of performance; those respecting the remedy, by the *lex fori*. The distinction between the law applicable to the validity and that governing the performance was first clearly announced in this country, I believe, in the very able opinion of the court in *Depau v. Humphreys*, 20 Martin (La.), 1. A bill of exchange given in Louisiana for money advanced in that State, with a reservation of interest lawful there but usurious in New York, was held to be valid, though the payment was to be in New York. This decision is criticised by Judge Story, who inclines to refer all contracts, even as to their validity, to the place of performance. *Conf. Laws*, § 304. Judge Curtis, in arguing the important case of *Carnegie v. Morrison*, 2 Met. 381, assailed the same case, and maintained the doctrine of Story; but the court decided that the contract, which was a letter of credit issued in Boston, authorizing bills of exchange to be drawn at Gottenburg in Sweden on London, was to be governed, as to its validity and effect between the original parties, by the law of Massachusetts, though the bills drawn under it must conform to the law of Sweden, and the acceptance of the bills to the law of England; which is precisely the doctrine of *Depau v. Humphreys* and *Scudder v. Union Bank*, above cited.

Mr. Wharton, in his valuable work on the Conflict of Laws, § 401, proposes, as a rule which best harmonizes the authorities, one substantially like that of the decisions above referred to, though carrying the division one step farther: "Obligations, in respect to the mode of their solemnization, are subject to the rule *locus regit actum*; in respect to their interpretation, to the *lex*

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loci contractus; in respect to the mode of performance, to the law of the place of performance. But the *lex fori* determines when and how such laws, when foreign, are to be adopted, and in all cases not specified above supplies the applicatory law."

In the case of a bill of exchange, the contracts of the various parties are distinct, and the drawer is bound, generally speaking, according to the law of the place where the bill is drawn, which is in most cases the same as that in which it is to be paid by him, if he pays it. Still he is to a certain extent involved in the same law with the acceptor, because upon due protest, demand, and notice he is bound to make good to the holder what the acceptor ought to have paid at the place where he was to pay, which makes it necessary to ascertain what that amount was by the law of that place, and whether by the same law due demand was made of the acceptor and due protest upon the dishonor. What the drawer should pay as interest, *ex mora*, or as damages, does not depend upon the law of the place where the acceptor was to pay the bill, if that is different from the place where the drawer's contract is to be performed.

So far the parties to this petition are agreed, and I have therefore cited no authorities for some of my positions; but here they divide. The general creditors contend that the law of Massachusetts governs this matter of damages in the present instance, because the remedy is sought here; and, if that be not so, because Boston is the place of performance. The petitioners maintain that the law of New York is to be followed, because the bill was negotiated there, and the first holder lived there.

I am of opinion that the Massachusetts law governs, not because the damages are part of the remedy, which they are not, but because Boston was the place in which the drawer undertook to perform his contract.

In Massachusetts, it is held that the rate of interest to be recovered, *ex mora*, for default in paying a promissory note, is a mere matter of remedy. The decisions which establish this point, if applicable to bills of exchange, are not binding on this court, because the law of bills of exchange is part of general commercial jurisprudence, and not of local law or usage: *Swift v. Tyson*, 16 Pet. 1; *Watson v. Tarpley*, 18 How. 517; and so is

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any question of the conflict of laws. When we have ascertained what local law applies to the case, we follow it; but the ascertainment itself is not a local question.

In most cases, the place where a note is made or a bill is drawn, indorsed, or accepted, is, in fact, the place where the parties respectively undertake to pay it; and therefore questions rarely come up of any distinction between the law of the contract and that of the performance; and the courts, in pronouncing on such cases, have had no such distinction in mind, and any general statements as to the contract being governed by the law of the place where it is made or is to be performed must be taken with that allowance. When they say that a bill is to be paid by the acceptor at the place where he accepts, and by the drawer where he draws, they are stating the general presumption of fact, that a bill or note is probably dated at the place where the party intends to pay it. The petitioners do not deny that it is the place of performance whose law must govern the decision of this controversy, if that is a different place from the place of entering into the contract; but they insist that unless the contract provides expressly for a different place, that of making the contract is conclusively and always the place of performance, and that a contract is made where it is delivered.

My opinion is, that where no place of performance is mentioned in a note or bill, it is to be paid by each person liable upon it, at the place of his own domicile, using that word in a sense large enough to include an established place of business as well as one of residence. Mr. Justice Story, *Conf. of Laws*, § 293 *c*, note 3, says, that if a note is made in one State and negotiated to an indorsee in another, the contract of the maker with the indorsee takes effect as a promise in the State where the note was made, and not where it was indorsed. It will be recollected that Judge Story refers all contracts to the place of performance, and therefore his meaning here is, that the maker of a note is to pay it at his own home. So Westlake, § 235, affirms that the acceptor promises to pay the bill, if no place of payment is named, at the known place of business from which he dates his acceptance. And Wharton, § 451, says, that if an indorser indorses a note when casually absent from his domicile, it is the law of such dom-

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icile that binds, that being construed to be the place, so far as he is concerned, of payment. The eminent jurist, Savigny, as quoted by Mr. Wharton, § 426, gives several rules of law on this subject, of which two are pertinent to this case. One is, that the seat of a continuous business supplies its local law to all obligations emanating from him who conducts the business; and the other, that the debtor's domicile supplies the law to his obligations emanating from the domicile.

These remarks agree with the general opinion of business men, as I suppose. I take it that if a banker issues bills or notes to circulate as money, there is no doubt that his undertaking is to pay them over his counter. I take it that this bill would be called a Boston bill on London, and that all merchants would understand that the drawer's undertaking is to pay in Boston if the drawee shall not do so in London, and he is duly notified thereof in Boston. Boston bills on London are bought in large quantities by merchants in New York, sometimes in Boston by agents of the buyers, and sometimes in New York from agents of the sellers, and sometimes, I dare say, on the cars between the two places. Now, it seems to me inadmissible to say that the same apparent contract between the same parties may have three different modes of performance, according as it is delivered in one place or another. It is true that all contracts take effect from delivery; but the question in every case is, what does the contract mean after it has been delivered? And I am of opinion that a banker's draft, dated at his usual and only place of business, is payable there on the default of the drawee, by the implied terms of the contract itself, and by the usage of merchants, and by law.

Let us look now at some of the decisions. It is well settled, that, in order to hold the indorser of a note not by its terms payable at any place, demand must be made upon the maker at his domicile; that the date of the note is presumptive evidence of the domicile, and in Massachusetts, at least, the date proves the domicile for the purposes of demand and notice, unless the holder knows of some other. But if the holder knows the real domicile, payment must be demanded there. If the promisor has changed his domicile after the note is made, the holder is not

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obliged to follow him beyond the jurisdiction; but if his new domicile is within the same jurisdiction, he must demand payment there: *Fisher v. Evans*, 5 Binney, 541; *Stewart v. Eden*, 2 Caines, 127, per Livingston, J., explained in *Anderson v. Drake*, 14 Johns. 114; *Woodworth v. Bank of America*, 19 id. 391; *McGruder v. Bank of Washington*, 9 Wheat. 598; *Reid v. Morrison*, 2 Watts & S. 401; *Taylor v. Snyder*, 3 Denio, 145; *Smith v. Philbrick*, 10 Gray, 252; *Bank of Orleans v. Whittemore*, 12 id. 469; *Pierce v. Whitney*, 22 Me. 110; 29 id. 188.

The meaning of these rules is, that the contract of the maker of a note is to pay it at his domicile, no matter where he makes or negotiates it; that the domicile being usually the same as the date, he may be held to the latter as his domicile, if he has not notified the taker or holder of his note to the contrary; that the domicile, so far as jurisdiction is concerned, is that which he had when the debt was contracted, and his contract is not to vary with every removal which he may make. Many of the cases turn on due diligence; but diligence in what? In demanding payment of the note at the place where the maker of it is bound and is presumed to be ready to pay it, that is to say, the place of performance. The decisive proof of this is, that if a place is agreed on for the performance, no demand need be made elsewhere; so that actual diligence and actual demand are not the important things, but a compliance with the law which requires demand to be made at the place of performance.

Coming now to decisions of particular cases more or less like that at bar, the first which I shall cite is a leading Scotch decision, which is given at large by two learned writers on the Conflict of Laws, — Sir R. Phillimore, vol. iv. p. 612 (1st ed.), and Mr. Wharton, § 452. In that case, a Scotchman residing in Edinburgh made a note payable to a banker, named and described as manager of the British & Australian Bank, 55 Moor-gate Street, London. This was held to be a Scotch debt; nothing was proved about the place of delivery or of negotiation, from which we may infer that they were not considered important.

In *Hicks v. Brown*, 12 Johns. 142, A. drew at New Orleans a bill on B. in Pennsylvania, in favor of C. in Tennessee, and it

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was held that the law of the drawer's contract was that of Louisiana. That is precisely this case; the bill taking effect when it reached the hands of the person who had given consideration for it in a State other than that in which it was drawn.

In *Pine v. Smith*, 11 Gray, 38, a citizen of Massachusetts negotiated in New York for a loan from a citizen of that State at eight per cent interest, which would make the contract void for usury in New York, and this was secured by note with a mortgage of land in Massachusetts. *Held*, a Massachusetts contract; not, however, by reason of the mortgage, which is not once mentioned in the opinion of the court.

The case of *Grimshaw v. Bender*, 6 Mass. 319, goes much beyond the present. There, a bill was drawn in England upon a firm whose domicile was in Boston; but the bill was payable in London, and was accepted in England by a member of the Boston house who happened to be there. The bill not having been paid, was sued against the acceptors in Boston, and the court held that the measure of damages was regulated by the law of Massachusetts, because that was the domicile of the acceptors. That case is not considered sound by Judge Story: *Conf. Laws*, § 419; Mr. Wharton cites both the case and the criticism, without giving his own opinion: *Conf. Laws*, § 451, note *a*. The bill was expressly made payable in London, and of course the acceptors should pay in Boston what would have produced the amount of the bill in London, which, in the absence of statute or local usage, is exactly what a drawer in Boston would be obliged to pay, and therefore the substance of the decision is sound; but in making the acceptors technically drawers in Boston, and liable to damages as such, the court overlooked the circumstance that they were not the drawers, but stood as London acceptors casually sued in Boston. After this allowance is made, the case remains a high authority for holding the domicile to be the place of performance, when none other is appointed by the contract itself.

It has been twice held in England that a bill drawn abroad and filled up and negotiated in England, is valid, if sufficiently stamped according to the law of the place of apparent drawing, though not sufficiently by the law of England: *Snaith v. Min-*

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gay, 1 M. & S. 87 ; *Baker v. Sterne*, 9 Ex. 684. These decisions have been supposed to depend upon an estoppel worked by the negotiation of the bills to innocent holders ; but this explanation is not sound ; they are put by the judgments upon the plain and simple reason that the contract of the drawer was made abroad ; and not only so, but estoppel does not avail against the stamp laws of England : *Steadman v. Duhamel*, 1 C. B. 888.

In Pennsylvania, too, it was decided that the drawer of a bill, signed by him in blank as to amount, &c., in that State, though filled up and passed in England, must pay damages according to the law of Pennsylvania at the date of the drawing, and this, though the rate of damages had been diminished by a statute passed before the bill was actually negotiated : *Lennig v. Ralston*, 23 Penn. St. (11 Harris) 137. In *Campbell v. Nichols*, 4 Vroom, 81, the precise distinction is taken that the validity of an acceptor's contract depends upon the law of the place where the bill is negotiated and first becomes a contract, but that in all matters concerning the interest to be paid by him upon that of the place where he undertook to pay. In a later case, cited by the petitioners here, the same court, citing *Campbell v. Nichols*, say, though they do not decide, that a drawer's contract may differ from an acceptor's in this respect : *Freese v. Brownell*, 6 Vroom, 285 ; but there is neither reason nor authority for any distinction : each is liable to make good his promise when and where he undertook to make it good, as I have already shown ; and if that means at the acceptor's domicile for his part, it means at the drawer's for his.

In *Van Zant v. Arnold*, 31 Ga. 210, the maker and the indorser of a note both lived in Georgia, but they made and indorsed it in Tennessee, where it took effect as a contract by being delivered to an agent of a creditor of the maker who lived in New York. It was held to be a contract governed by the law of Georgia as against the indorser, because he was domiciled there.

Many cases are cited by the petitioners to prove that the *lex loci contractus* is where the bill or note is actually negotiated. I have assumed that to be the general rule ; though, if it were needful, I could point out many exceptions to it. It is not necessary, because every case but one which touches that point

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turns upon the validity of the contract, and not upon the mode of performance, nor upon the damages for a breach. Thus in *Tilden v. Blair*, 21 Wall. 241, a bill for \$5,000 was drawn in Illinois and accepted in New York, and then sent back to Illinois, where it was indorsed and negotiated at a rate of interest which would be usurious in New York, and avoid the contract. The acceptor was sued in the circuit court of the United States sitting in New York; and the court held that the validity of the acceptance depended on the place of negotiation, and gave judgment for the plaintiff for an amount which it considered the law of Illinois made the contract available for, in its inception: The supreme court said that the bill was good for its face, and that the only error was in not giving judgment for the whole \$5,000 and interest. They could not correct the error nor say whether the interest should be reckoned at the legal rate in Illinois or in New York, because the plaintiff had acquiesced in the ruling below. The only point in this case, therefore, is not reached by that decision.

All the other cases cited are open to a similar remark, excepting *Cook v. Moffat*, 5 How. 295, which is said to be decisive of this question in favor of the petitioners. I do not so understand it. That case was, that A., in New York, sold goods there to B., of Baltimore, who gave his note for the price, and afterwards took the benefit of the insolvent law of Maryland. The court held that the discharge in Maryland did not release the debt due to A. Mr. Justice Grier, in delivering the opinion of the court, says, that the notes, being delivered in New York in payment of goods purchased there were, of course, payable there, and governed by the laws of that place, citing *Boyle v. Zacharie*, 6 Pet. 635; Story, Conf. § 287. The case cited decides that advances made by a factor are to be reimbursed to him at the place where he makes them; and Judge Story, at the place cited, repeats the same doctrine. I cannot suppose that Mr. Justice Grier intended to overrule all the cases and opinions which I have cited above. There is undoubtedly much authority for the proposition, that the whole contract of sale of goods, including the payment, is governed by the law of the place of sale; this is to say, the buyer is to seek out and pay the seller if the goods are sold on

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credit, and if for cash, he must pay him on the spot. By the law both of New York and of Maryland, the note given for the price of goods is merely security for the payment; and on surrender of the note an action for the price of the goods may be maintained. If, therefore, an action for goods sold would not be barred by a discharge in Maryland, because its performance was to be in New York, the security ought not to be destroyed thereby. This is what I understand Mr. Justice Grier to mean in the brief remarks above quoted, though he speaks in the popular way of the note being given in payment for the goods. There are, likewise, I believe, decisions that an ordinary loan is to be reimbursed where it is made, at least if no note or bill is given for it, though the cases are, perhaps, not reconcilable on this point.

This transaction was not a sale of goods nor a loan of money, but the transfer of a credit. The undertaking of Glyn was, that if Benson & Co. should not accept or should not pay in London, and due demand and protest were made there, he would pay in Boston, on due notice and demand here.

The interest and damages to be proved against Glyn's estate are to be assessed by the law of Massachusetts.

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Sect. 2 of Stat. March 3, 1820, which imposes a forfeiture of double the value of goods illegally imported, upon any one who knowingly receives them, is not confined to goods imported from territory adjoining the United States.

Nor is that section confined to cases arising under statutes in operation when that section was enacted.

The act of entering goods by a false invoice comes within the definition of an illegal "importation" under that section.

That section was repealed by the Revised Statutes, which were passed June 22, 1874, and not before, and then not retroactively; and this case, which was begun May 1, 1874, is not affected by the repeal.

Congress appears, in Rev. Sta. § 5596, to express the opinion that this section had been repealed by some statute before 1874, and they probably had in mind the act of 1866; but this expression of opinion does not overrule *U. S. v. Stockwell*, 18 Wall. 481.

LOWELL, J. The eighty-one counts for double values are brought under sect. 2 of the act of March 3, 1823, 3 Stats. 781, which imposes that penalty upon all persons who shall receive goods, knowing them to have been illegally imported and liable to seizure by virtue of any act relating to the revenue; which is understood, according to the decision in *Stockwell v. U. S.*, 13 Wall. 451, to subject the importer himself to a penalty or forfeiture of treble the value of the goods so imported: one as importer, and two as receiver; and the declaration in this action is framed on that theory, which is not now denied by the defendants. But they maintain, in support of their demurrer, that in certain particulars this case differs from *Stockwell's*, and that these are of vital consequence. The illegality is alleged to have consisted in entering goods by means of fraudulent invoices.

1. The first point taken is, that the act of 1823 only applies to importations from adjacent territory. It is true that the title of the act makes it an amendment of that of 1821, which is exclusively devoted to such importations; but the second section mentions "any act relating to the revenue," and this is too clear to be controlled by the title: *Hadden v. The Collector*, 5 Wall. 107.

2. The second objection is, that the section in question is not prospective, but relates solely to statutes then in existence. Here, again, the language seems to be unambiguous, and to mean that as fast as laws are passed relating to the revenue, which impose forfeitures and permit seizures, this law will apply. The case of *Stockwell* is in point, for the law which was said to have been violated in that case, as I understand it, was that of Aug. 30, 1842.

3. The third objection is, that all the illegal acts relied on were done after the importation of the goods, because that was complete when the vessel arrived at her port of destination, and entering goods is no part of the importation. The decisions cited establish beyond question that, for many purposes, such as fixing the date at which a statute raising or lowering duties takes effect upon any goods, the importation or bringing into the United States is consummated when the vessel arrives. If a different meaning is to attach to the word in the act of 1823, it is a subject of regret, because confusion must follow from the use of the same word in different senses in the same set of laws.

I am of opinion, notwithstanding, that it is impossible to confine the section within the strict limits demanded by the defendant's argument. The revenue laws use the words "to import," "to bring in," "to introduce," as synonymous. Thus the act of Aug. 30, 1842, sect. 19, 5 Stats. 565: "If any person shall knowingly and wilfully, with intent to defraud the revenue, smuggle or clandestinely introduce into the United States;" the act of July 18, 1866, sect. 4, 14 Stats. 179: "If any person shall fraudulently or knowingly import or bring into the United States," &c.; and there are many others.

Under these statutes, smuggling, or bringing in, or introducing goods, has been held by both the circuit and district courts for this district for a long course of years to be proved by evidence of the secret landing of goods, without paying or securing the duties, which, according to the argument here, would be quite inadmissible, if the importation in the sense contended for had no element of concealment about it. I have never known a case of smuggling in which any concealment on board the vessel was relied on by the government. The gist of the offence is the evasion or attempted evasion of the duties, and they, to be sure, are due when the vessel arrives; but they are not payable until some time after, and it is the default in paying which is the fraud, or in omitting the acts which immediately precede the payment.

These decisions have been acquiesced in by able counsel, and are the law of this circuit at least, and, I doubt not, of all, so far as the statute of 1842 is concerned. Here, then, we see that a bringing on shore without making entry, &c., is part of the importation or introduction of the goods, and makes it illegal.

Under the statute of 1866, it was held by some very able judges, in the cases cited at the bar, that goods could not be said to be illegally imported unless the very act of bringing them within a port of the United States was unlawful. The law of this circuit is otherwise, as I have said; and, in a recent decision by Mr. Justice Strong, at circuit, *U. S. v. Thirty-nine Trunks*, 22 Int. Rev. Rec. 317, the cases referred to are held to be too narrow. In that case, an importer came over with his goods, packed in trunks, and passed them off for luggage, and procured them to be landed as such; then, becoming alarmed, attempted to make proper declara-

tion of them. The learned judge held not only that the goods were landed without a permit, in the true sense of the law, but that they were illegally imported, in this, that the importer had not prepared himself with the invoices necessary to their entry at the custom-house. It was a clear case of smuggling, under the construction given to the act of 1842 ; but that statute had been repealed by the Revised Statutes through a misunderstanding, and the decision was, as I have stated, that is to say, that the statute of 1866 should be construed to include a fraud connected with the entry of the goods or an intent not to enter them. That decision, as I understand it, would apply the law to a fraudulent invoice as well as to the absence of an invoice.

Let us look at the history of this section and of the words used in it. The collection act of 1799, sect. 69, 1 Stats. 678, provides that if any person shall conceal or buy goods, knowing them to be liable to seizure by virtue of that act, he shall pay double the value. The act of 1823 adds the word "receive," and makes the knowledge to be of their having been *illegally imported and* liable to seizure under *any revenue law*, and not merely "liable to seizure under this act." It is by no means clear that "and" might not be construed "or" in this connection ; but, passing that consideration, it seems clear that this section was intended to enlarge rather than to restrict the operation of sect. 67 of the act of 1799. I have not been told what illegal importations there could be under the statutes concerning the revenue then in force, unless we give the word an enlarged meaning ; because, as was justly said by the defendant's counsel, the non-intercourse and navigation acts are not laws relating to the revenue, and I have not found any possible illegality, excepting as against those statutes, in the mere bringing of goods within the limits of a port of the United States.

By the act of 1799, importers of distilled spirits, wines, and teas, were obliged to make careful report and entry of those articles, for which very minute directions were given. The articles were then to be inspected, and the inspector was to give a certificate to accompany each package, and to be passed over to every purchaser ; and if any one in possession of such articles could not produce a certificate, the goods were liable to seizure ; and if,

upon the trial, the owner should not prove that the goods were "imported into the United States according to law," and the duties thereon paid or secured, they should be adjudged to be forfeited. Sect. 43, 1 Stats. 660. I cannot discover from the statute that the words, "imported into the United States according to law," mean, in this connection, any thing else than duly reported, entered, &c., and this not merely as to form, but in substance, that is, by a true report and entry. The defendants argue that this part of the act of 1823 refers merely to importations from adjacent territory, under the act of 1821. If this were so, there is no illegal importation possible in the restricted sense contended for. The act of 1821 provides, that every person coming from any foreign territory adjacent to the United States with merchandise subject to duty shall deliver a manifest thereof at the office of any collector or deputy collector which shall be nearest the boundary line or the road or waters by which the merchandise is brought; and, if he shall neglect or refuse to deliver the manifest, or pass by or avoid such office, the merchandise shall be forfeited. To neglect or refuse to deliver a manifest, or to avoid going to the nearest office, are acts which, according to the argument here, are subsequent to the importation, and therefore there was nothing on which the act of 1823 could operate. But if such neglect or avoidance makes the importation illegal, which this part of the argument admits, then I do not see why the presenting a fraudulent manifest, if that had been mentioned in the statute, as a fraudulent invoice is in the law which is said to have been violated in this case, would not equally relate back, if relation is necessary, and be a solid ground for holding the importation to be illegal.

Finally, there is *U. S. v. Stockwell*, 13 Wall. 431, which is the principal authority in all parts of this case, in which the charge was of receiving goods which had been imported without payment of the duties, to which the remarks already made apply, that the neglect to pay duties must have arisen after the goods were brought within the limits of the port of destination.

4. Another important and difficult question is whether the second section of the act of 1823 was repealed before May 1, 1874, the date of the writ in this action. It cannot be doubted that

sect. 5596 of the Revised Statutes repealed this law ; but this action being already on the docket on the 22d June, 1874, when the Revised Statutes were passed, and the repeal being conditional, saving all penalties and forfeitures, and all actions civil and criminal, it is essential to the defendants' case to carry the repeal further back.

They contend that the act of July 18, 1866, 14 Stats. 179, worked a repeal of the section in question ; and they have furnished me with manuscript copies of the opinions of the district and circuit courts (Judges Blatchford and Johnson) for the southern district of New York, in *U. S. v. Clafin*, where this point is adjudged. As I cannot agree with these judgments, I am bound to give my reasons. The reasoning of the learned judges makes it appear very probable that congress considered sect. 2 of the act of 1823 to have been repealed by that of 1866. Congress say, in sect. 5596, that in respect to all statutes of which any part is contained in the revision, they repeal the parts which they have omitted, and that they have omitted only what was already repealed. The repeal is clear, but the reason may be an unsound one. I can recall to mind at this moment two instances, besides this, in which sect. 5596 repeals laws which had never been repealed or superseded before ; and I have no doubt there are many others. *U. S. v. Clafin* decides that this expression of opinion by congress has the effect of a retroactive repeal, and binds the judgment of the courts in respect to causes of action arising between 1866 and 22d June, 1874, which had not ripened into a decree on that day. This is the point of difference between us. Congress had an undoubted right to repeal the act of 1823, and to drop with it all causes of action vested in the United States ; but an expression of its opinion, not taking the form of a law, is not a precedent which I am to follow against a judgment of the supreme court. In Stockwell's case the decision was that the section in question was not repealed by the act of 1866. It is said, in the opinion of Johnson, J., above referred to, that the forfeitures in Stockwell's case had accrued before July 18, 1866, which is true ; but as the statute of that date did not save penalties and forfeitures, but only actions and indictments then pending, and as the action against Stockwell was not then pending,

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the point was properly and necessarily before the supreme court, and was decided. Put in the strongest way for the defendants, the repealing sections of the Revised Statutes, as applied to this statute, read thus : Whereas, the supreme court has decided that the act of 1866 did not repeal that of 1823, and whereas, we think it did, now, therefore, we repeal it, but we save all penalties, actions, &c. Granting, as I have already done, the power of congress to repeal all laws which give penalties and forfeitures to the United States, and this without saving any not yet enforced, still it does seem to me clear that they carefully abstained from doing any thing of the sort in this particular case. What I do not grant, is the power of congress to bind the court by a mere expression of opinion : it must be by a legislative act, and this they have not attempted.

Judge Blatchford has cited three late cases in the supreme court, in two of which the effect of the Revised Statutes, and in the third that of another statute, is referred to in construing earlier statutes and applying them to cases arising before, but determined after, the repeal : *Murdock v. Memphis*, 20 Wall. 590 ; *Smythe v. Fiske*, 23 Wall. 374 ; *Bailey v. Clark*, 21 Wall. 284. Neither of these cases decides that the opinion of congress is to control the courts. The first two appear to me to express the contrary opinion with reasonable clearness, though the point was not in judgment. The last is a case in which congress had said that a certain phrase in a former revenue act should be construed in a certain way favorable to the tax-payer. The court decided that this was the true construction, and added that the act of congress appeared to apply to cases arising before its passage ; and they imply, undoubtedly, that congress may make such a declaration. This is precisely what I have already conceded to be within the power of the legislature ; namely, to diminish the rights of the United States, though I should doubt very much their right to increase the burdens of the citizens retroactively. The difficulty which I find in this case is, to see that congress has made any such declaration. The general rule that neither congress nor any other legislature in the United States is to exercise the purely judicial power of deciding the state of the law, without a legislative act to take such effect as it may lawfully

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have, is one of the points upon which I know of no conflict of opinion, and, therefore, do not cite authorities for it.

If I had any right to express a personal wish, it might be that a higher authority shall find my construction of the repealing act to be other than that which I feel bound to affix to it. But in my own mind the point would not be doubtful, were it not for the case of the *U. S. v. Claflin*; and, notwithstanding that decision, I am unable to reach a different conclusion.

Demurrer overruled.

B. F. Brooks & F. W. Hurd, for the defendants.

E. R. Hoar & G. P. Sanger, District Attorney, for the United States.

NOTE. — This case was compromised soon after the foregoing opinion had been delivered.

Ex parte F. J. LAKE & AL. — RE WHITING, MCKENNA, & CO.

JANUARY, 1877.

Where A., B., C., and D., copartners, were lessees of a building, and bound by the covenants to pay rent for several years, and two of the partners left the firm, and the others, with some new partners, assumed the debts and liabilities, and the new firm became bankrupt, — *Held*, that the retired partners had not the right to prove against the estate a claim for unliquidated damages by reason of their liability on the covenants of the lease, unless there were some special stipulation for such a contingency contained in the lease.

A provision in a lease that the lessors might re-enter and re-let the premises at the risk of the lessees, who should remain liable for the rent, and be credited with the sums actually realized, will not authorize a proof for unliquidated damages against the estate of the bankrupt lessees by the lessors, who have re-entered and re-let the premises at a less rent than before.

BANKRUPTCY. — PROOF FOR FUTURE RENT. — In September, 1873, William C. Tebbetts and Charles Haley demised certain chambers on the corner of Summer and Kingston Streets, in Boston, to F. J. Lake, Sidney Cushing, Franklin B. Daniels, and J. E. K. Herrick, for the term of five years from Oct. 1, 1873, by an indenture under seal; and the lessees entered into the usual covenants for payment of rent, &c. The lessees composed the mercantile firm of Lake, Daniels, & Cushing, to whom was soon after added one Bliss, and they had Albert T. Whiting as a special

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or limited partner. Afterwards J. McKenna bought out Mr. Bliss, and on or about Jan. 1, 1875, the firm was dissolved, and a new firm, called Whiting, McKenna, & Co., was formed, to carry on the same business at the same place. By this arrangement Lake and Daniels retired, and Whiting became a general partner; so that the new firm consisted of A. T. Whiting, James McKenna, S. B. Cushing, and J. E. K. Herrick. By an indenture dated Dec. 2, 1874, the old firm conveyed all the joint property, including leases, to the new firm; and the latter assumed the debts and liabilities, and covenanted to indemnify Lake and Daniels therefrom. After the indenture was made, but before the new firm began business, P. G. Leonard was admitted as a partner, and verbally undertook all the obligations of that position. The new firm occupied the chambers for the prosecution of their joint business, and paid the rent out of their joint assets. In March, 1876, proceedings in bankruptcy against Whiting, McKenna, & Co. were begun in this court, which are still pending.

The lessors have proved against the joint assets the arrears of rent due them at the time of the bankruptcy. Lake and Daniels now offer for proof, as unliquidated damages, the amounts which they allege that they shall be obliged to pay under their covenants in the indenture of lease. This instrument contained the following clause: "Provided always, and these presents are upon this condition, that if the said lessees or their representatives or assigns do or shall fail to perform any or either of the covenants contained in this instrument, which are on their part to be performed, or if the said lessees shall be declared bankrupt or insolvent according to law, or if any assignment shall be made of their property for the benefit of creditors, then, and in either of said cases, the lessors, or those having their estate in the premises lawfully may immediately, or at any time thereafter, and while such neglect or default continues, and without further notice or demand, enter into and upon the said premises, or any part thereof, in the name of the whole, and repossess the same as of their former estate, and expel the lessees or those claiming under them, and remove their effects (forcibly if necessary), without being taken or deemed guilty of any manner of trespass, and without prejudice to any remedies which might otherwise be

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had for arrears of rent or preceding breach of covenants ; and thereupon the lessors may at their discretion re-let the premises at the risk of the lessees, who shall remain for the residue of said term responsible for the rent and taxes herein reserved, and shall be credited for such amounts only as shall be by the lessors actually realized."

The lessors have re-entered and re-let the premises at a reduced rent, the land having fallen in rentable value ; and the solvent lessees ask to prove the total amount of the deficiency calculated to the end of the term.

LOWELL, J. I have no doubt that a former partner, or a joint covenantor with the bankrupts, who is liable for joint debts, and pays them, may prove the amount against the assets of his former partners or of his co-contractors: *Ex parte Young*, 2 Rose, 40 ; *Ex parte Taylor*, id. 175 ; *Ex parte Carpenter*, Mont. & McA. 1 ; *Wood v. Dodgson*, 2 M. & S. 195 ; *Aflalo v. Foudrinier*, 6 Bing. 306 ; *Ex parte Ogilby*, 3 Ves. & B. 133 ; *Butcher v. Forman*, 6 Hill, 583. The decision in Massachusetts, that a retired partner could not prove for debts which he had paid after the beginning of the bankruptcy, was put upon the ground that the insolvent law provided only for sureties in the strict sense : *Morton v. Richardson*, 18 Gray, 15 ; a somewhat narrow construction, considering that such a partner is so far a surety that the creditor will discharge him by giving time to the remaining partners, with knowledge that they have assumed the debt : *Oakeley v. Pasheller*, 4 Clark & F. 207. Our statute does not raise so nice a point, because it follows the English law, in giving not only to sureties but to all " persons liable " for the bankrupt the right of proof ; and this phrase undoubtedly includes retired partners.

If the lessors in this case have a claim for unliquidated damages which they do not choose to offer in proof, then, under rule 30 of the supreme court, the retired partners may offer it in the name of the lessees.

After reflection and consideration, I regret to find that, in my opinion, the liability is not one which can be proved. If the contract were a little different, and provided merely that the lessees should pay any loss or damage consequent upon the

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diminished value of the premises, the amount would be capable of ascertainment with sufficient certainty: *Ex parte Llynvi Coal Co.*, L. R. 7 Ch. 28. I intimated in *Ex parte Houghton*, 1 Lowell, 554, 557, that our leases might provide by stipulation for a case of this kind, and I remain of that opinion, and think it would be wise to adopt such a practice. But I am unable to reach the conclusion that the stipulation in this case is calculated to work out the result. It seems to provide that the lessees, after a breach, shall remain liable for the rent precisely as before, excepting that they are to be credited with any sums actually received for the use of the premises. This brings the case, unfortunately, within the numerous decisions concerning rent, which, not accruing at once, cannot be estimated beforehand. The original lessees, therefore, would not be liable for a gross sum at any time, nor could we ascertain, with any certainty, what sums they will be entitled to have credit for during the remainder of the term.

Proof rejected.

A. A. Ranney and Brooks, Ball, & Storey, for the creditor.

R. M. Morse, Jr., for the assignee.

Ex parte ESTABROOK. — Re WOOD AND LIGHT MACHINE COMPANY.

FEBRUARY, 1877.

The treasurer or manager of a manufacturing corporation, established by the laws of Massachusetts, has authority, by virtue of his office, to give negotiable notes in the prosecution of the business of the company, but not for the accommodation of third persons. If such an officer gives a note without authority, it is valid in the hands of an innocent purchaser for value before maturity.

A *bona fide* purchaser is not bound to inquire into the character of a note which on its face is valid.

Circumstances that would put a prudent man on inquiry will not affect the title of the purchaser of a note before maturity, if he did not in fact know of any defect in the title.

ESTABROOK & SMITH, bankers or brokers, of Worcester, offered for proof against the estate of The Wood and Light Machine Company five notes, signed by Richardson, Meriam, & Co., and

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indorsed by the bankrupt company, by their treasurer, and duly protested for non-payment. The corporation was a manufacturing company, organized under the general law of Massachusetts, and consisted of four persons, who had formerly composed a firm. There was evidence tending to show that the notes were indorsed by the corporation for the accommodation of Richardson, Meriam, & Co.; that all the members of the company were aware of the course of dealing with that firm, and one of them objected or advised against it, because he thought it unsafe; that there was a by-law of the company forbidding any officer or member from using the name of the corporation for any other than the legitimate business of the corporation. There was evidence that the petitioners bought the notes of the promisors for value, before they were due, but at a considerable discount; that statements were made at some time by the promisors, though not, perhaps, with reference to these particular notes; that the parties had close business relations with each other.

G. F. Verry, for the proving creditors, cited *Monument Bank v. Globe Works*, 101 Mass. 57.

T. L. Nelson, for the assignee, cited *Torrey v. Dustin Monument Association*, 5 Allen, 327; *Eastman v. Cooper*, 15 Pick. 276; *Shaw v. Spencer*, 100 Mass. 382; *Williams v. Cheney*, 8 Gray, 206; *Smith v. Livingston*, 111 Mass. 342.

LOWELL, J. It is admitted by both parties that the treasurer or manager of a trading corporation may, by the law of Massachusetts, bind the company to the payment of promissory notes made in pursuance of the business of the company; and that he has no such authority in respect to notes given for the accommodation of third persons. If, however, a note of the latter kind is held by an indorsee, who took it for value before it was due, and without notice, his title is good: *Monument Bank v. Globe Works*, 101 Mass. 57.

So much being granted, the decisions of the supreme court of the United States have established two rules which must govern this case.

1. The first is thus stated by Mr. Justice Clifford, for the court: "The repeated decisions of this court have established the rule, that, when a corporation has power under any circum-

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stances to issue negotiable securities, the *bona fide* holder has a right to presume that they were issued under the circumstances which give the requisite authority, and that they are no more liable to be impeached for any infirmity in the hands of such a holder than any other negotiable paper:" *City of Lexington v. Butler*, 14 Wall. 282, 296, citing *Gelpcke v. Dubuque*, 1 Wall. 203; *Knox County v. Aspinwall*, 21 How. 539; *Supervisors v. Schenck*, 5 Wall. 784; *Bissell v. Jeffersonville*, 24 How. 287.

2. It is argued, and there is some evidence tending to prove, that the fact that a note is offered for sale or discount by the promisor has a tendency to excite the suspicion that it is indorsed for his accommodation, and to put the buyer on inquiry. Granting that this is true, and, for the purposes of this case, that the conversations testified to do not prove a sufficient inquiry to satisfy an inquisitive mind, yet here, again, the decisions of the highest court are, that a failure to inquire, or negligence of any degree, will not invalidate the title of the holder, unless they convict him of actual knowledge, or of a wilful negligence amounting to fraud: *Goodman v. Simonds*, 20 How. 343; *Murray v. Lardner*, 2 Wall. 110; *Michigan Bank v. Eldred*, 9 Wall. 544; *Hotchkiss v. National Banks*, 21 Wall. 354.

These authorities are decisive, unless I should be satisfied of knowledge or fraud in fact, which I am not, and which was not seriously imputed to these creditors in argument.

Debt admitted to proof.

 ONE ANCHOR AND CHAIN.

FEBRUARY, 1877.

A steamship lost her anchor, at night, in a roadstead within the limits of the harbor of Boston, and a wrecker, knowing the ownership of the vessel, and that the owners were ready to contract for the recovery of the anchor, went in search of it, and succeeded in finding but was unable to raise it, when another wrecker, employed by the owners, came to the spot, and offered him twenty-five dollars for what he had done; and, when that offer was rejected, offered the use of a steam winch for raising the anchor. The first wrecker expended money and time in recovering the anchor, and refused a tender of fifty dollars. *Held*, that he should have twenty-five dollars, without costs.

SALVAGE. — The steamship *Palestine*, in coming to anchor inside of Boston Light, at night, on Saturday, Jan. 6, 1876, lost an anchor and chain. On the following Monday, Francis H. Caverly, one of the libellants, master of the wrecking schooner *Plover*, who now joins his crew with him in this proceeding, applied to the pilot who had brought in the steamship to give him the range of the place where the anchor and chain were lost. The pilot replied that he supposed that the agents of the ship, Warren & Co., of Boston, were negotiating for the recovery of the property, and if Captain Caverly would bring an order from them, he would give him the information. Without seeing the agents, Captain Caverly went down with his vessel to the place he supposed to be that of the loss, and succeeded in finding the end of the cable. While he was trying to raise the anchor, which was very heavy and was fast in the clay, a wrecker came down who had been engaged by the agents of the ship, upon the terms that he should have twenty-five dollars if unsuccessful, and fifty dollars if he brought up the anchor and chain. This wrecker had a steam winch, and offered the libellant, Caverly, who was not provided with such an apparatus, to let him have the use of it; he also offered to buy out the libellants. Both offers were rejected, and this wrecker went back to Boston. Caverly found that he could not raise the anchor, and went to town and hired a wrecker who had the necessary means, and who had been an unsuccessful bidder for the contract, to come and raise the anchor, for forty dollars, which he did.

The claimants tendered the libellant fifty dollars, which he refused.

J. B. Richardson, for the libellants.

M. Storey, for the claimants.

LOWELL, J. There seems to be an unwritten law in the harbor of Boston, that whoever first obtains possession of a lost anchor holds it against all the world until his salvage is paid. Such a usage cannot stand the examination of the courts. This anchor and chain were not derelict in any proper sense. Their owners were known to the master of the *Plover*, and it was known that they had the hope and reasonable expectation of recovering it. This libellant might have been a bidder for the

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contract, but he has no right to make his bid with one end of the cable in his possession. When the contractor came down and was prepared to offer him twenty-five dollars, which represented the full amount of trouble which the libellants had saved him, they should have accepted the offer.

They were likewise bound to accept the offer of his steam winch, their own appliances being inadequate, by which they would have saved a day and a large expense. The net result of these exertions is that the true and known owners of the property have met with delay, trouble, and the expenses of a lawsuit, all growing out of a mistaken notion that possession of another man's property gives the possessor a right to deal with it as he pleases.

The cases of ships or goods picked up at sea, in which there can be no reasonable ground to believe that the owner would ever have seen them again if the salvor had not happened to find them, have no application to an anchor and chain lost in a known spot within the limits of the port where the vessel is lying.

Considering that this is the first case of the kind, I shall allow the libellants the twenty-five dollars, without costs; though, in the next case of the kind, salvage will probably be refused.

Decree accordingly.

Re J. M. SAWYER.

MARCH, 1877.

It is the duty of the registers to examine and regulate the charges and expenses of assignees and counsel, whether any creditor objects to the account or not.

Assignees have no moral right to spend money, which is not more than sufficient for the privileged creditors, in litigation for the benefit of the general creditors. They are bound to pay the privileged debts as soon as money can be realized for the purpose.

The charges of the assignees for counsel fees, and for their own services in this case, considered, and much reduced.

LOWELL, J. The account rendered in this case brings to view one of the weak points of this, as of all other bankrupt laws, — the temptation which assignees are under to exhaust the assets in

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unwarrantable charges. I wish it to be distinctly understood that it is the duty of the registers to examine and regulate the charges, whether any creditor takes the trouble to object to the account or not; and to see that, when the account is correct, a dividend is paid. I had supposed this was well known, but this account seems to have lain in the register's office for some months, without action.

The assignees in this case have received about \$6,000, and the charges for legal services are about \$2,000, and for the assignees themselves \$1,200. These are all disallowed. For their services the assignees may have the commissions established by the rule of the supreme court, and no assignees are ever to have more, without my order, as I have already decided. For counsel fees I allow the sum of \$200. I disallow the item of \$100 paid to the register's clerk.

The bill will be reformed by the clerk on this basis, and a dividend will be paid forthwith to the privileged creditors of the amount in the hands of the assignees, as found upon a proper accounting.

In this case, the debts, not exceeding \$50 each due the workmen, are more than enough to absorb the fund, and I wish to repeat what I said at the hearing, that, where there are debts due workmen which are privileged, the assignee has no moral right to waste their money in litigation for the supposed benefit of the general creditors. If the latter want litigation, they must pay for it. In future I shall allow no counsel fees in such a case until the privileged debts are paid in full.

I do not think it necessary, in most cases, that the workmen should be put to the expense of proving their debts, and the estate, to the very considerable cost of paying their dividends in due and regular form. If the general creditors agree, the assignee may pay them, out of hand, as soon as he receives enough money for that purpose, or may pay a part equally among them. The assignee, no doubt, is entitled to the protection of a proof, if he requires it; but he will not often find it essential to his safety.

Account to be reformed.

Greenish v. Standard Sugar Refinery.

J. H. PRICE v. J. H. SEARS.

MARCH, 1877.

A seaman cannot have salvage for the boat which has brought him to land after the loss of his ship.

LOWELL, J. The libellant served as second mate on the defendants' ship on a voyage from Galveston to Liverpool, and thence towards San Francisco, until the vessel was unfortunately burned at sea. The libellant landed at one of the Marquesas Islands after a long and difficult voyage in a boat which he commanded. The captain's boat and all in it were lost; the mate's boat arrived at land, but neither that officer nor any of the crew were within reach to be examined as witnesses in this case. The owners paid the libellant his wages, at the agreed rate, to the time of the loss of the vessel; but he maintains that he was engaged at Galveston one month earlier than is shown by the shipping articles; that he received one month's less advance than they express, and that he served as first mate during a part of the voyage after leaving Liverpool. [The judge then examined the evidence, and decided that the wages had been fully paid.]

The libellant asks salvage for the boat; but as the boat appears to have saved him quite as much as he the boat, that account is *in equilibrio*. *Libel dismissed.*

C. G. Thomas, for the libellant.

O. W. Holmes, Jr., & W. Munroe, for the respondents.

J. GREENISH v. STANDARD SUGAR REFINERY.

MARCH, 1877.

Where the respondents owed freight to the libellants, and were summoned as their garnishees in the State court, and, after some time, gave bond to the plaintiffs in the action in which they were summoned as garnishees, and thus dissolved the attachment, and afterwards the case in this court for the recovery of the freight was decided, — *Held*, that the respondents, not having tendered the freight, were bound to pay interest on the amount found due, at the market rate of three per cent while the money was under attachment, and at the statute rate of six per cent after the attachment was dissolved.

LOWELL, J. A somewhat nice question is raised in this case : whether the defendants should be decreed to pay interest on the freight found due from them. They were summoned in the superior court of the State as trustees or garnishees of the owners, before the cargo was fully delivered in May, 1876, and that attachment was discharged by bond with sureties in October, 1876, of which fact they were notified. It seems to be clear, that, from the time the attachment was discharged, they could be excused from the payment of interest only by a tender of the amount which they admitted to be due, and which I have found to be the true amount.

The question is, whether, for the time that the funds were under arrest, they are chargeable. Upon this point there is great diversity of practice. In some States it is held that a garnishee is excused from paying interest, unless it is proved that he has made it ; in others, that he is liable for it, unless he proves that he did not make it ; and, in still others, he must pay the money into court, if he would be relieved of this charge. In Massachusetts, the rule appears to be, that, if the garnishee owes a debt which by its terms bears interest, he will be bound to pay it, as an incident to the principal, though his power of paying was suspended by the misfortune of an attachment : *Adams v. Cordis*, 8 Pick. 260. And, on the other hand, that he will not be bound to pay it while an attachment was pending, if it is no part of the contract, but is merely assessable as damages for non-payment : *Oriental Bank v. Tremont Ins Co.*, 4 Met. 1 ; *Rennell v. Kimball*, 5 Allen, 356. The distinction is rather nice, unless by contract is meant an express contract, because in debts due *ex contractu* it is difficult to draw the line between an implied promise to pay interest, after demand, or after the debt is due, and a liability to pay the same interest, *ex debito justitiæ*, as damages. Rent, for example, is held in many of the States, and, I suppose, in Massachusetts, to bear interest without a demand, and I suppose freight does ; but whether as damages or as impliedly contracted for, I confess I do not know ; but an express contract may perhaps be held to overrule all considerations of a general character.

In some cases stress is laid upon the money not having been paid into court or set apart. I know of no right that a garnishee has to set money apart, or invest it, with or without interest.

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He is simply a debtor ; and if his debt bears interest, for any reason, or in any mode of assessment, I hardly see why the interest should stop until the principal is paid. Interest is not assessed as a penalty for default, so much as being, on the whole, the fairest mode of making the plaintiff good ; and it is often assessable when the defendant has been unable to pay or tender the amount due, through some misadventure or other beyond his control.

However, I do not think the admiralty is bound to any hard and fast rule on the subject, unless where some statute or positive contract regulates the matter. The defendants had the use of the money, and money was worth, it seems, three per cent a year on call, while they had it ; and they are traders. I think the true settlement for this case is to allow interest at the rate of three per cent for the time the attachment was pending ; and I consider six per cent to be due, as matter of law, after that obstruction was removed.

Decree accordingly.

THE SARAH J. WEED.

MARCH, 1877.

Jersey City is foreign to the city of New York, in the sense of the law governing supplies to ships.

The note of an agent of a ship taken by material-men does not affect their lien, unless so intended by both parties.

The lien of material-men is assignable ; and the assignee should proceed in the admiralty in his own name, if the assignment is absolute.

The case of *The A. D. Patchin*, 12 Law Reporter, 21, dissented from.

The note of a third person, given as security for supplies to a ship, must be produced in court when a decree for the price is made against the ship, and the amount realized from the decree must be indorsed on the note.

Supplies furnished in Maine by a material-man in New York to a vessel belonging in New York, are foreign supplies, and give rise to a privilege.

This rule applied in favor of the ship's agent.

The general agent of a ship at her home port is not entitled to be subrogated to the lien of seamen whose wages he has paid in the regular course of his agency.

SUPPLIES AND REPAIRS. — The Sarah J. Weed was a steam-boat built and owned in New York, and employed in and near the harbor of the city of New York in towing vessels and similar duty from October, 1874, when she was new, until (June,

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July) 1876. In that month the steamboat was sent to the Kennebec River in Maine, and was there employed during the remainder of the summer. She came to Boston in the latter part of 1876, where some repairs and supplies were furnished, and where she was afterwards arrested and sold at the suit of material-men, the owners having failed to stipulate for her. The sum of \$6,897.18 now remains in the registry for distribution, and claims have been filed by material-men, mortgagees, and others against this fund. The various parties were heard upon the evidence produced by them respectively; and, as it was doubtful whether the fund would pay all in full, each was allowed to dispute the claim of the others.

E. Avery & G. M. Hobbs, for mortgagees.

R. D. Smith, for the owners and agent.

F. Goodwin, for Donegan.

G. M. Reed, for Canfield & al.

F. Dodge, W. A. Herrick, R. Thompson, for several petitioners.

LOWELL, J. I will examine the disputed claims in their order on the docket.

CANFIELD & QUINTARD'S CLAIM. This firm claim a considerable balance of account for coal and wood supplied to the steamboat at their wharf at Jersey City. The custom was for the master to order and receive his supplies from time to time as he needed them, and once a month the bills were settled with the ship's agent, Mr. Weed, in New York. Weed occasionally paid cash, but more often gave his own notes to the order of Canfield & Quintard, which the latter would usually procure to be discounted.

1. Jersey City is foreign to New York, and therefore the material-men have a lien by the general maritime law, unless they have waived it: *The Kosciusko*, 11 N. Y. Leg. Obs. 38; *The John Lowe*, 2 Bened. 394.

2. Taking a note is not a waiver of the lien, unless it was so intended by the parties: *The Chusan*, 2 Story, 456; *The St. Lawrence*, 1 Black, 522; *The Kimball*, 3 Wall. 37; *The Emily Souder*, 17 id. 666. In this case no waiver was intended, for the material-men, when they received cash, receipted the account, and when they took a note, merely said, at the foot of their bill, "received a note," describing it.

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3. It came out upon the examination of one of the petitioners that they had made some sort of an assignment of their property for the benefit of creditors, and that this petition is presented with the consent of the assignee. Thereupon the argument is made that a maritime lien is incapable of assignment.

That a debt secured by hypothecation may be assigned, together with the securities, would seem to be plain enough, but for some comparatively recent decisions in several district courts which have denied it, and which I will examine. But, first, I will show that many of the authorities which take the highest rank in the admiralty of this country have upheld such assignments.

In *Thomas v. Osborn*, 19 How. 22, a libel was brought against a ship by the assignee of a material-man, and Chief Justice Taney, at the circuit, made a decree in his favor. The supreme court reversed the decree, the chief justice dissenting. The arguments on both sides were on the merits of the case, and the simple point that the assignee had no standing in court which would have been decisive of the case was not alluded to by the bar or the bench. We have no report of the decision of the chief justice in the court below, but it is plain that he cannot have overlooked the point, because in *Reppert v. Robinson*, Taney, 492, his attention had been called to it; and he must have been satisfied that his *dictum* in that case could not be supported. Indeed, that *dictum* goes the length of intimating that a *chose in action* cannot be assigned in the admiralty, which no one will now contend for. "It is every day's practice in admiralty," said Nelson, J., "to allow suits to be brought in the name of the assignee of a *chose in action*:" *Cobb v. Howard*, 3 Blatchf. 525. Judge Sprague made a similar remark in *Swett v. Black*, 1 Sprague, 574; and the remarks in those cases were not *dicta* only, but were a necessary part of the decision.

In *The Hull of a New Ship*, Daveis, 199 (2 Ware, 203), Judge Ware examined the point upon principle and authority, and held that the debt due a material-man could be assigned, and that the hypothecation went with it. A similar point was decided by Judge Betts, in *The Panama*, Olcott, 343. In Judge Sprague's reports there is a head-note which passed under his revision to the like effect in *The General Jackson*, 1 Sprague, 554, though

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the case did not require, perhaps, a decision of the point, as the debt had been assigned only as security. A similar *dictum* by Judge Betts is found in *The Boston*, Blatch. & How. 309. In *The Cabot*, Abb. Adm. 150, the holder of a bottomry bond bought the debts due the seamen, and took an assignment, and filed a separate libel for them. The learned judge upheld the assignment, and, of course, decided this point; but he informed the bottomry holder that he had caused unnecessary expense, because the law would have made the assignment for him, and that one libel would have sufficed for his bond and the assigned wages. The subrogation which the learned judge refers to is nothing but an assignment operated by the law itself, and is perfectly well established in the admiralty: see *The Tangier*, ante, p. 5, and the cases there cited.

"It is every day's practice" for underwriters who have paid a loss, or to whom an abandonment has been made, to sue in their own names in the admiralty, not only for damage against a vessel which has injured the ship which they have insured, but for general average, and other matters arising *ex contractu* or *quasi ex contractu*: *The Monticello*, 17 How. 152; *Fretz v. Bull*, 12 id. 466; *The George*, Olcott, 89.

In *The Wasp*, L. R. 1 Adm. & Eccl. 367, a shipwright, who had assigned the debt, successfully maintained an action *in rem* for the benefit of his assignee. Our practice, as we have seen, permits the assignee to sue; but if the assignment has been of part of the debt only, the action may be maintained by the assignor for the benefit of himself and the assignee: *Fretz v. Bull*, 12 How. 466. In *The John Cock*, 17 Jur. 306, the assignee in insolvency of a master of a vessel applied for leave to prosecute *in rem* for the balance due the master, without the usual stipulation for costs, and we learn from Pritchard's Digest, vol. ii. p. 524, that leave was given.

The decisions on the other side to which I have referred begin with *The A. D. Patchin*, 12 Law Reporter, 21, in which Judge Conkling decided that the lien of a seaman could not be assigned. His reasons are singular. They are, that at common law liens upon chattels are closely limited and depend upon actual possession, and so from their very nature cannot be trans-

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ferred ; for the mechanic has no right to transfer the possession. He adds : " In the absence of any authority to the contrary, the mariner's lien ought in like manner to be considered as restricted in its design, and as merely personal." Now, nothing can be more different than a lien at common law and one in the admiralty, and especially in the necessity for possession ; and to reason from one to the other, upon the very point upon which they differ the most strikingly, is not sound reasoning. Then, the absence of authority might properly lead to the conclusion, one would say, that a court of admiralty, which is equitable in its modes of dealing, would uphold assignments of *choses in action* ; because, if it differed in this respect from other courts of equity, there would be no lack of cases in which those differences would be pointed out and explained. Authorities were not wholly wanting, since Judge Ware's decision and two of Judge Betts's had been made before this time, though I am not sure that any of them had been published. Judge Conkling's case was cited and followed by Judge McCaleb, in *The George Nicholas*, Newb. 449 ;¹ Judge Leavitt, in *The Æolian*, 1 Bond, 267 ; and Judge Longyear, in *The Champion*, 1 Brown, Adm. 520. Only in the last of these cases is there any examination of authorities, and Judge Longyear regrets that he has not had time to make a more careful search for the decisions. He does not cite *Thomas v. Osborn*, nor the decision of Judge Ware, nor the more important of those of Judge Betts. I have found but one other *dictum* in this matter : Judge Magrath, of the district court for South Carolina, decided that taking a note would not discharge the lien of a material-man, but added, by way of *dictum*, that negotiating the note would discharge it : *The Kensington*, 8 Am. Law Reg. 144. He says that Judge Story says that Emerigon says that such a lien is a " personal privilege." He had been citing *The Nestor*, 1 Sumner, 73, and the opinion in that case does contain such a statement. But Judge Story does not mean that it is not transferable : to use his expression in that sense is to make a bad pun or quibble. What he means is, that it is a personal, as distinguished from a real, privilege, according to the classification of

¹ The same learned judge admitted an assignment by subrogation in *The T. P. Leathers*, Newb. 482.

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the civil law, which has nothing whatever to do with its being assignable or otherwise.

Judge Longyear refers to some decisions under the mechanic's lien laws of the several States, relating to land and buildings. The analogy is not very close, because those liens are imposed by positive law upon the land of persons who have in some respects less opportunity to protect themselves than a ship-owner has, and in favor of persons whose means of protecting themselves are much better than those of persons who supply a ship; and more especially, because land is not a ship, and the commercial law does not resemble the law of landed property. There is, undoubtedly, much difference of opinion and decision on this matter under those laws, and I do not think it worth while to examine the cases. The general rule of equity is clear, that what a man has he may assign, excepting damages for wrongs of a personal nature, such as slander or assault. The convincing reason is that given by Judge Ware, in the case cited, that the debtor cannot be injured by an assignment, while the creditor will lose part of the benefit of his security, if he cannot assign it.

The assignment here is said to be for creditors; and I have no doubt that all debts due and all securities for those debts are, and always have been, assignable for that purpose. Our bankrupt act expressly says, in § 5046, that there shall vest in the assignee all debts due the bankrupt, and all liens and securities therefor. This is only declaratory of the law as it has been held under all bankrupt and insolvent statutes; and admiralty liens have been repeatedly upheld in favor of assignees in bankruptcy and insolvency. I am of opinion that the general law of the admiralty is that debts due material-men are capable of assignment, together with the liens and securities therefor, and that this would be the law of assignment for creditors in bankruptcy or insolvency in any event.

As it is our practice for the assignee to sue in his own name, the petition must be amended by joining the assignee. Any notes that are outstanding must be produced to the clerk. As they were the notes of Mr. Weed, a third person, they need not be cancelled, unless the money holds out to pay them in full; but the amount paid under the decree must be indorsed on them.

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DONEGAN'S CLAIM. Donegan was to furnish a condenser made of copper tubes for a given price at New York; but the vessel left the port before the articles were ready, and the contract was varied, so that the tubes were sent to Portland in charge of the claimant's foreman, who delivered them on board the vessel; but the master left that port before they were put into place, and took them with him. If this debt comes under the law of New York, giving a lien for work and materials upon domestic vessels, it is not barred, because the required notice may be recorded at any time within ten days after the vessel returns to the port where the debt was contracted; and this ship had not returned to New York when this petition was filed. But it is plain, upon inspection of the statute, that, in order to hold a lien, the contract must be made and the work and materials must be actually furnished within the State of New York: 3 Rev. Sts. (1875) 782; and so are the cases *Moore v. Lunt*, 4 N. Y. Sup. Ct. (T. & C.) 154; *Phillips v. Myers*, 30 How. Pr. 184; *Crawford v. Collins*, 45 Barb. 269.

Hence the question arises whether these materials were furnished in the home port in the sense of the general maritime law, or, in other words, whether there is an intermediate case between the foreign and domestic laws where there will be no lien. The Massachusetts lien law evidently proceeds on the same theory that the supplies must be actually furnished within the State to create a domestic lien: Gen. Sts. ch. 151, § 12 *et seq.* I think the maritime law agrees with this theory, and holds that supplies furnished in a foreign port, though by a citizen of the State to which the vessel belongs, are foreign supplies. I have not had time to examine all the cases, but have a strong impression that there are such, and think I have once decided so myself. The converse has been held in two cases, that supplies furnished in the home port by a foreigner will be domestic supplies: *The Kosciusko*, 11 N. Y. Leg. Obs. 38; *The Eliza Jane*, 1 Sprague, 152. I feel safe in deciding, without a more exhaustive examination of the authorities, that the law is so.

WEED'S CASE. Upon the ground just mentioned, I think Mr. Weed may have a lien for the money he furnished to the master in Maine. It is always a question of fact of some difficulty

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whether the agent of a vessel does not look to the personal credit of the owners, or to his equitable lien on the freight. But upon the evidence of the state of credit of these owners and of the situation of the vessel, I think I may hold that for supplies furnished after the vessel left New York the agent may have a lien.

He asks for a charge, by subrogation, for wages which he paid seamen in New York. But here he stands very differently. Those were disbursements made in the usual course of his agency, like those made by the master of a vessel in a foreign port, in which Mr. Justice Curtis refused subrogation in *The Larch*, 2 Curtis C. C. 427. Much of the reasoning of the learned judge in that case seems to me to put bounds to the doctrine of subrogation, which cannot be submitted to, as I have shown in *The Tangier*, ante, p. 5; but the decision in *The Larch*, which is binding upon me, denies the agent this right; and so is *The Louisa*, 6 Notes of Cases, 531. Subrogation is an equitable assignment, operated by the law itself, when justice requires it; as, for instance, when a surety pays the debt of his principal, not when an agent pays it; or when one having an interest in the property or *res*, or honestly believing himself to have an interest, pays an earlier incumbrance. None of these considerations apply to an agent, and I am not aware that the rule has ever been extended to such a person.

The claims, respectively, of HEATHER and JARRARD were for supplies furnished in New York, when the boat was in her home port; and the time for recording notice was suffered to expire without record. They are rejected.

Three mortgagees have made claims, which are admitted to be valid; but their payment must be deferred until those of material-men are paid in full. I am aware that in some recent cases it has been held that mortgages and the liens of material-men rank alike; and in other cases the opposite rule has been applied, which I now apply. But these were all cases of *domestic* liens, and their rank must depend on the law which gives them their existence; and I dare say all those cases may be reconciled by study of the several statutes. These are general liens in this case, and there is no sort of doubt that they take precedence of a mortgage, unless they have become stale. The mate-

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rial-men are to share *pro rata*, if there is not enough for all. In the case of a sea-going ship, the liens rank in the inverse order of their dates, if a voyage or voyages have intervened between them; but I see no reason to apply that rule to supplies furnished to a boat from week to week, as she goes about her ordinary work in harbor, nor to draw a line between such supplies and those furnished in Maine or Boston, because it does not appear that the material-men in New York had any sufficient notice that she was to be employed in a new service, and therefore they had no particular occasion or opportunity to enforce their rights before she left that port.

Let a decree be drawn in conformity with this opinion.

Ex parte J. O. SAFFORD & AL. — Re T. DOWNING.

APRIL, 1877.

Leather was bought on a credit of sixty days, by parol, and the goods were weighed in the presence of the buyer, and the damaged hides rejected, and the shrinkage agreed on: they were then placed by themselves in the sellers' warehouse, marked with the buyer's name, and he was to send for them when he pleased. He made an arrangement with the seller concerning the insurance of the goods. This course of dealing was usual between the parties. *Held*, the goods had been accepted and received by the buyer within the statute of frauds of Massachusetts, and the goods having been destroyed by fire in the sellers' warehouse, the sellers could prove for their price against the assets of the buyer in bankruptcy.

STATUTE OF FRAUDS. — Safford & Co. offered for proof against the estate of Downing the price of certain lots of leather bought by him of them at sundry times under parol contracts. Some of the leather had not been taken away from the petitioners' store at the time of the great fire in Boston, on the night of Nov. 9-10, 1872. As to these lots, the question was whether they had been accepted and received by the bankrupt, within the statute of frauds of Massachusetts, Gen. Sts. ch. 106, § 5.

The parties had dealt together for a long time. The habit of Downing was to come to the warehouse of the petitioners nearly every day, and to buy entire "tannages," as the lots from a single tannery are called, on a credit of sixty days. The leather

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was always weighed in his presence; the damaged hides were thrown out, the shrinkage agreed on, and his leather was piled up by itself, and marked with his name; and he sent for it when he pleased. Some time before the fire Downing asked one of the petitioners whether the leather was insured, and was told that they had a general insurance, which was more than enough to cover any probable loss, and that he should have the benefit of any surplus, after they were indemnified on their own stock. He testified that he made this inquiry because he considered the leather to be his.

B. J. Hayes, for the creditors.

B. Dean, for the assignee.

LOWELL, J. — The single question in this case is whether the goods had been accepted and received by Downing, within the meaning of the statute of frauds. They had been weighed in his presence, and the precise hides agreed on, and the shrinkage ascertained. At his request, though whether in his presence or not is not quite clear, they had been set apart from all other goods, and marked with his name; and he was to take them when he pleased to send his carrier for them. No delivery could be more complete, unless they had come into his personal possession; and I do not understand it to be denied that, at common law, the property would have passed. Undoubtedly the decisions upon the statute have introduced some refinements not easily reconciled with common sense, by which the property in goods is held to have passed and not to have passed at the same time; and they are said to have been delivered by the buyer before they are received by the seller. I have no intention of departing from those decisions; but this case steers wide of them.

The latest authorities make the distinction between accepting goods and receiving them to be this: Goods may be constructively delivered, as to a carrier or warehouseman, and yet not accepted, if, for instance, they were ordered by word of mouth, or bought by sample; and the carrier or warehouseman is not, as such, without special appointment, the agent of the buyer to ascertain that the goods conform to the order or to the sample; and, therefore, in such a case, the goods may be received and yet

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not accepted. It was formerly said that the goods must be received, and an opportunity be given to examine them, before they could be accepted; but in a very elaborate opinion of the queen's bench this doctrine was denied to be sound, and a defendant was held bound who had exercised acts of ownership over the goods, though he had not precluded himself from objecting that they did not conform to the contract; or, in other words, there might be an acceptance to satisfy the statute, and let in proof of the contract, which yet would not be an acceptance under the contract itself, when proved: *Morton v. Tibbett*, 15 Q. B. 428. In *Cusack v. Robinson*, 1 Best & S. 299, Blackburn, J., says, "Acceptance may be before receipt;" and it was there decided that specific goods, agreed on and afterwards sent to a warehouse named by the vendee, had been both accepted and received by him. Whether the courts of Massachusetts would assent to the full extent of the law laid down in *Morton v. Tibbett*, *ubi supra*, I do not know; but I take it to be clear that, by the law of this State, and of the United States generally, as well as of England, if specific goods are fully agreed on and bought, and afterwards sent to a warehouseman or carrier designated by the vendee, the statute is satisfied: *Ullman v. Barnard*, 7 Gray, 554; *Cross v. O'Donnell*, 44 N. Y. 661; *Howes v. Ball*, 7 B. & C. 481; *Dodsley v. Varley*, 12 A. & E. 632.

There is no doubt that the vendor may himself be the warehouseman or bailee. This was decided in the leading case of *Elmore v. Stone*, 1 Taunt. 458. I have seen it stated that this case has been overruled; but that is a mistake. It was fully approved by Shaw, C. J., who states the exact case, though he does not cite it by name, in *Arnold v. Delano*, 4 Cush. 40. It was cited and followed in *Beaumont v. Brengeri*, 5 C. B. 301, and *Marvin v. Wallis*, 6 Ellis & B. 726; and its doctrine reaffirmed in *Cusack v. Robinson*, *ubi supra*. See Benj. Sales (2d Am. ed.), 136.

It has often been decided that there can be no sufficient receipt by the vendee, so long as the vendor holds as vendor, and insists on his lien for the price. The reason is given by Abbott, C. J., in an early case, that if the vendee had actually received the goods, it would necessarily follow that he could maintain trover for them, and the vendor would be left to his action for the

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price: *Baldey v. Parker*, 2 B. & C. 37. In this case there is no doubt that the vendor's lien was gone; for the vendee usually removed the goods within the sixty days for which credit was given, and had an undoubted right so to do.

If the decision were to turn merely on the conditional contract of insurance made by the vendee, that would be sufficient evidence to warrant a jury in finding a receipt of the goods. The cases are many where a sale, or a mere offer to sell, or a request by the vendee to the vendor to sell on his account, and various other acts of ownership, have been held sufficient for that purpose, though the goods remained in the actual possession of the vendor, or of a middleman: *Chaplin v. Rogers*, 1 East, 192; *Blenkinsop v. Clayton*, 7 Taunt. 597; *Marvin v. Wallis*, 6 Ellis & B. 726; *Castle v. Swoorder*, 6 H. & N. 828.

It may be said that a resale would be a fraud on the vendor, if the goods are not the property of the vendee, and that for this reason the latter is estopped; but the true reason is, that such an act is of itself evidence of acceptance and receipt; and a contract of insurance is fully as significant in this respect.

It was argued that, in a certain sense, the lien of the vendor was not gone, because, if the vendee had become insolvent, it might have revived under the decision in *Arnold v. Delano*, 4 Cush. 33, and similar cases; and it was added that, so long as the right of stoppage *in transitu* was not lost, there could be no receipt by the vendee. The law is so given in Story, Sales, § 276; but there are many decisions to the contrary of that statement, and none in its favor that I have seen. In *Bushell v. Wheeler*, 15 Q. B. 442, *note*, Coleridge, J., said of the right to stop *in transitu*, "That is a bad test: there might be stoppage *in transitu*, though there had been a note in writing." Lord Denman, C. J., made a similar remark in delivering the opinion of the court; and the decision covers the point. So are *Cross v. O'Donnell*, 44 N. Y. 661; *Castle v. Swoorder*, 6 H. & N. 828; and in point of principle the following cases, as well as those above cited, in which delivery of accepted goods to a carrier were held to have been received by the vendee within the statute, though in most of them the right of stoppage might have been exercised if the vendee had become insolvent: *Dodsley v. Varley*, 12 A. & E. 632;

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Howes v. Ball, 7 B. & C. 484; *Pinkham v. Mattox*, 53 N. H. 600. The revival of the vendor's lien in case of insolvency is an equitable doctrine very difficult to explain at common law; but it arises only upon bankruptcy or insolvency, and does not then re-vest the property.

Lastly, it is said that certain late cases in Massachusetts are opposed to the plaintiff's argument: *Knight v. Mann*, 118 Mass. 143; s. c. 120 Mass. 219; *Safford v. McDonough*, id. 290; but they are not like this case. In the former, the goods were not taken out and weighed in the presence of the buyer; and he had done no act of acceptance except to authorize them to be set apart, and to say that he would send for them. The court said that he had still the right of examination and rejection, which it is clear that the bankrupt in this case had not. In the latter case, the plaintiffs were holding the goods as unpaid vendors, and had refused to deliver them excepting for cash or a satisfactory note. This case is more like *Ross v. Welch*, 11 Gray, 235, where the defendant bought growing cabbages, and received constructive delivery of them on the ground. It is true a few were actually delivered; but that fact is not noticed in the judgment of the court, who say, "An agreement to sell an article ready to be delivered and taken away, though still standing in the soil, un-evoked, is sufficient delivery to give effect to the sale between the parties."

It is not necessary to go so far in this case; because the hides were delivered in an unequivocal manner, and put by themselves, and insured for the buyer, though it happened, through most unforeseen circumstances, that the insurance was inadequate. With all the refinements to which I have before alluded, I know of no case, either in England or the United States, in which such circumstances have not been considered evidence for the jury to find both acceptance and receipt to satisfy the statute; and, as a jurymen, I have no hesitation in saying that they were so accepted and received, because this was the undoubted intent and understanding of both parties.

Debt admitted to proof.

Ex parte Harris, Chipman, & Co. — Re Cochrane.

Ex parte HARRIS, CHIPMAN, & CO. AND OTHERS. — Re JOHN COCHRANE, JR.

MAY, 1877.

Where a manufacturer consigned goods to his factors, and drew against them bills, which the factors accepted, for an amount much beyond what the goods ultimately realized, and both parties failed, leaving outstanding acceptances for about \$116,000, and goods and their proceeds in the hands of the factors for about \$26,000, and both parties became bankrupt, and the factors employing, without objection, the \$26,000, made a composition of forty per cent with all their creditors, including the holders of the bills, who reserved a right to prove in full against the drawer and all other parties, — *Held*, these creditors, proving against the drawer, need not give credit for the full forty per cent, but must abate their proof in the proportion of 90,000 to 116,000; that is, must give credit for the \$26,000 which might, upon their application, have been applied towards paying their bills.

Where notes are exchanged, the presumption is that each party is to pay his own.

Where notes were exchanged, and the holder has received a payment from the maker of one of these notes, before he offers proof against the estate of the indorser he must prove only for the balance.

The proof is complete when the affidavit is filed with the register or assignee, and payments received after that time need not be credited.

BANKRUPTCY. — AMOUNT OF PROOF. — CREDITS. — John Cochrane, Jr., the bankrupt, was a manufacturer of carpets, and Harris, Chipman, & Co. were his selling agents or factors, and advanced him their notes from time to time, which he indorsed and procured to be discounted. Both parties failed, at which time there were outstanding in the hands of several banks and individuals notes of this kind for about \$116,000; and the factors had goods of Cochrane's to the value of about \$26,000. Harris, Chipman, & Co. went into bankruptcy March 7, 1876, and offered a composition of forty per cent, which was accepted and recorded April 29, 1876. The several holders of the notes received the forty per cent, and gave Harris, Chipman, & Co. a covenant not to sue them; reserving the right to prove the full amount of the notes against the other parties to them.

Cochrane went into bankruptcy March 30, 1876. The question now came up, whether the holders of the notes could prove in full, or for what other amount, against the assets of Cochrane.

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A proof in full had been made, and afterwards modified, by order of the register, by deducting the amount paid in composition by Harris, Chipman, & Co.; and the petition now was for a revision of this order. The affidavits for proof against Cochrane's estate had been made and sent to the assignee, or to the register, very near the time that the resolutions of Harris, Chipman, & Co. were recorded.

W. Munroe, for the assignees of Cochrane.

F. S. Hesseltine, for Harris, Chipman, & Co.

J. R. Bullard & C. K. Fay, for holders of notes.

LOWELL, J. In so far as the notes offered for proof were given for the accommodation of Cochrane, it is immaterial whether payments by the parties who stood in the relation of sureties were made before or after the proof was made in this case, because it is held under our bankrupt law, by a great preponderance of authority, and upon unanswerable reasoning, that the holder of a bill or note may prove it in full against the party primarily liable upon it, notwithstanding he may have received a part or all of the amount from a surety or *quasi* surety. See *Ex parte Talcott, ante*, p. 820. Of course, the parties dealing together can agree that the creditor shall not have this right, but that it shall belong to the surety, in consideration of his payment; yet even then the course would be for the creditor to prove his note or bill in full, and to give to the surety his proportionate part of the dividends that might be received from the estate of the principal debtor. Here the agreement was that the holder should prove in full against the estate of Cochrane, and any other parties to the notes. But were these notes given for the accommodation of Cochrane? I think they may be so regarded in equity, to the extent that they were not secured by goods, and the proceeds of goods, in the hands of Harris, Chipman, & Co. If the latter had taken up their notes, they would be creditors of Cochrane for \$90,000. When both parties failed, the goods and their proceeds were applicable to the notes drawn against them, so far as they would go; and this equity might have been enforced by the holders, under the doctrine of *Ex parte Waring*, 19 Ves. 345, and that class of cases as applied in this country.

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It is a question not so clear whether the holders of the notes or bills, having the right to an appropriation of funds in the hands of a surety, can prove against the principal in full. I have said on one occasion that they cannot, and I have not found any reason to change my opinion. I do not mean to say they might not prove in full by expressly or impliedly renouncing their security; but that is impossible in this case, because the factors have appropriated the security, as they had a right to do, if the creditors did not object; but the result is, that \$26,000 of Cochrane's property has gone to pay the debts of Harris, Chipman, & Co., and to this extent I think the general creditors of Cochrane have a right to say that the holders of the notes shall not prove in full against Cochrane's assets. If the whole amount of these notes outstanding and offered for proof is \$116,000, each must be reduced in the proportion of \$90,000 to \$116,000.

There was one debt which presented a different question. Cochrane had exchanged notes with one Pearce, and the latter had paid thirty-five per cent upon all his debts, by some sort of composition. I do not understand that in exchanging notes either party is considered to be accommodating the other: each impliedly undertakes to pay his own notes in consideration of the exchanged note which is to be paid by the other. In this case, credit must be given by the holder of a note coming in to prove against Cochrane's estate, as indorser, for whatever dividend he has received or might have received from Pearce, as maker, before he offered his proof against the assets of the indorser, though not bound to give such credit where Cochrane is promisor. Under our practice, I think a debt is to be considered as proved when it is duly authenticated and sent to the assignee or the register, because ninety-nine in a hundred of all debts not proved at the first meeting are proved in this way. I do not think the date should depend on when the assignee or the register makes a formal entry of its allowance, provided the debt turns out to be just and true.

Referred to the register, to proceed in accordance with this opinion.

Ex parte Hamlin. — Re Brodt.

Ex parte HAMLIN. — Re H. D. BRODT.

MAY, 1877.

When an application is made to set aside a composition once recorded, and to proceed in bankruptcy, notice should be given to all the creditors as well as to the debtor.

When a composition, partly carried out, is set aside, all acts which have been regularly done in pursuance of the resolutions are valid, and the assignment to an assignee in bankruptcy should contain a proviso to that effect.

Creditors receiving their respective shares of a composition are not bound to see that other creditors receive their shares.

It seems, that a creditor, who knows that a composition is being carried out, and that the creditors are being paid, and makes no effort to obtain his own share, will be estopped to object to these payments.

In February, 1876, a petition in bankruptcy was filed against H. D. Brodt, as surviving partner of the firm of R. W. Dresser & Co.; and he at once offered a composition, which was finally accepted, and ordered to be recorded in April, 1876. It provided for payment of twenty per cent, by instalments, secured by notes, the last payment to be at the end of six months from the date of recording the resolutions.

In February, 1877, one Hamlin filed a petition in the cause, alleging himself to be a creditor of Brodt, and that he and some others had not been paid the composition, by reason of disputes concerning the amount of their respective debts, and that Brodt was apparently no longer able to pay the composition; but that the petitioner had reason to believe there were assets which might be reached by an assignee, and praying that the composition might be set aside, and for an adjudication of bankruptcy. After notice to the debtor the petition was granted and a warrant was issued. At the first meeting of creditors a question arose, and was certified to the court, of the right of a creditor who had received his twenty per cent, and had released the debtor, to prove his debt. Certain creditors then filed a motion to vacate the adjudication, or to modify it in such a way that the assignee should not disturb the payments which they had received under the composition.

The evidence tended to show that Brodt had given notes for

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the instalments of his composition to all the creditors whose debts were undisputed, or with whom he could adjust the amount due, leaving Hamlin, and perhaps two others, out of the account. There was no charge of fraud. Brodt's position was a difficult one, because his partner had attended exclusively to the financial affairs of the firm, and had died suddenly, leaving the business in much confusion. After the composition was recorded, the petitioner Hamlin entered into a partnership with Brodt, and had lent him money, and they had disposed of the old stock of R. W. Dresser & Co., and of such new goods as they bought; but the business was not profitable, and the new firm was dissolved. Brodt, in the mean time, paid all the composition notes as they came due, with the knowledge of Hamlin.

A. E. Pillsbury, for the petitioner Hamlin.

B. F. Brooks, J. W. May, E. Avery, and H. J. Boardman, for creditors.

LOWELL, J. The statute of 1874, ch. 390, § 17, Stats. p. 184, provides, that if at any time it shall appear to the court, on notice, satisfactory evidence, and hearing, that a composition cannot proceed without injustice or undue delay to the creditors or the debtor, the court may refuse to accept it, or may set it aside, and that the debtor shall then be proceeded with as a bankrupt. Upon examination, I think the point is well taken that "notice" means notice to the creditors as well as the debtor. If the debtor should make the application, as he clearly may, there would be no doubt; but the court cannot know that a creditor is not acting in concert with the debtor, to obtain a reversal of the composition. The notice is undoubtedly intended to be given to the parties interested; and in almost all cases the creditors must be such parties. I was misled by the analogy of petitions for adjudication, and by the fact that the action in cases of this kind heretofore has been upon motions which showed on their face that all the creditors stood on an equal footing. But it is plain that a creditor hostile to the composition, if he could procure the acquiescence of the debtor, might do great mischief in this way. Without committing myself to the position that such notice is absolutely essential in all cases, I hold that it was in this case.

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Several creditors having now been heard upon the merits of the question, it is not necessary to vacate the adjudication for a defect of notice, if a new decree of the same sort would follow. I therefore proceed to the other points taken by the creditors, that the remedy of setting aside the composition and going forward in bankruptcy is not appropriate to the case; that the petitioner, having stood by when the composition was entered into, and when the notes were paid, is estopped; that, at any rate, the decree of adjudication should be so modified that it cannot interfere with what has been done under the composition.

If the danger which the creditors fear, that the title of an assignee appointed at this time will relate back to February, 1876, so that the acts of the bankrupt since that day would all be voidable, were well founded, there would be very strong ground for holding this petitioner and all others having actual or constructive notice of the composition estopped to interfere with it. There was a time when it was thought that annulling proceedings in bankruptcy would render voidable every thing done by an assignee; but this fear was quieted by the able judgment in *Smallcombe v. Olivier*, 13 M. & W. 77; and there was a similar case in this country, *Penniman v. Freeman*, 3 Gray, 245. It is the law now that to annul or supersede proceedings of this character, means to stay their further prosecution.

So with compositions: the statute authorizes them, the court orders them; and payments made in conformity to a recorded resolution are not preferences. If the creditors are willing to trust a debtor to pay his composition, and exact no mortgage or transfer from him, they authorize him to raise the means for paying it, by dealing with his property: *Ex parte Burrell*, 1 Ch. D. 587; *Re Reiman*, 11 N. B. R. 21; *Re Van Auken*, 14 id. 425; and it cannot be held that the creditors are bound to see each other paid.

There is a hardship, undoubtedly, for those creditors whom the debtor omits from his list, or neglects to pay. In most cases, all difficulties would be met by the appointment of an assignee or trustee, to see that the composition is paid, and that all creditors are treated alike. I have not known the objection taken by a

Ex parte Hamlin. — Re Brodt.

creditor in any case, that too much power was left with the debtor. I have not been willing to interpose *mero motu*, because, looking at the statute and its history, I am not satisfied that it intends to insist that there shall always be such security, or any security, if creditors choose to dispense with it. Nevertheless, under our statute, which throws a decision upon the court, I think it might be a sound exercise of discretion in almost all cases to require security, if any creditor asked for it.

I am of opinion that the remedy of bankruptcy is intended to reach any case in which it is likely to work a beneficial result for one or more creditors, or for the debtor. The two or three creditors whose dividends have not been paid have other remedies. They may apply to this court in a summary way to require the debtor to pay them, or they may bring actions at law; but I think they may likewise go on in bankruptcy, if there is no objection raised. In this case, the debtor consents, and the general creditors have no objection, provided the decree shall be so modified as to express those points concerning the assignee's title, which I have already said would be necessarily implied. To this they are entitled, because a decree should be clear, and leave nothing to implication.

The ordinary form of assignment would make the assignee's title relate back to Feb. 6, 1876; and that is the day to which his title will relate; but in the assignment, after the mention of that date, there must be added: "*Without prejudice to lawful acts done or titles acquired under and by virtue of the resolutions for composition heretofore recorded in this cause.*"

Let a certificate be sent to the register that the creditors who have taken the composition have no right to vote for an assignee, and that the assignment should be in a qualified form, substantially as above indicated.

Durant v. Mass. Hospital Life Ins. Co.

W. B. DURANT v. MASS. HOSPITAL LIFE INS. CO.

MAY, 1877.

Money was deposited with a trust company by A., and the company agreed to pay the income during the life of B., the son of A., and, after his death, during the life of B.'s wife, C., if she should survive him, "the income to be applied to the support of said B. and of his said wife, C., and the education and support of their children," and to cause said payments to be made yearly to B. or C. in the order and for the purposes above stated, upon his or her separate order and receipt, to be dated on or subsequent to the several days on which the said several payments shall fall due, and declared the principal and the annuity to be inalienable, and not to be subject to debts. *Held*, that B. took the annuity as a sub-trustee, and was bound to apply it to the purposes named, and therefore, upon his bankruptcy, his assignee did not take it.

That the court could not apportion the annuity and give the assignee an aliquot part, B. having a wife and seven children.

BANKRUPTCY. — INCOME IN TRUST FOR BANKRUPT AND HIS WIFE AND CHILDREN. — This was a bill in equity, filed by the assignee in bankruptcy of the estate of S. K. Williams, the younger, asking that a certain annuity, or some part of it, might be decreed to belong to the complainant, as such assignee. In 1873, S. K. Williams, of Boston, deposited \$10,000 with the defendant company, upon trusts, declared as follows: "The said company shall and will, yearly and every year during the natural life of Samuel K. Williams, Jr. (son of said Samuel K. Williams), and after his decease during the natural life of his wife Lucy Williams, if she should survive him, the income to be applied to the support of said Samuel K., Jr., and of his said wife Lucy, and the education and support of their children, of Cambridge, in the State of Massachusetts, pay or cause to be paid to the said Samuel K. Williams, Jr., or to his said wife Lucy, in the order and for the purposes above stated, in yearly payments, on the first days of January in each and every year, during the natural lives of the said Samuel K., Jr., and of his wife Lucy, upon his or her separate order and receipt, to be dated on or subsequent to the several days on which the said several payments shall fall due; which annuity and principal sum are both hereby declared to be inalienable by the respective grantees

thereof, and not subject to their debts or control, the first payment to be made on the first day of January next, the same rate of interest as the said company shall actually make and receive upon their capital stock," &c.; with careful stipulations concerning the management, and other terms, not affecting the question raised in this case; and they agreed that after the death of S. K. Williams, Jr., and his wife, they would pay the principal to the executors or administrators of the father, to be by them distributed among all his grandchildren.

Mr. Williams, the elder, made a similar deposit for each of his seven children, and died in 1874, leaving a will, by which a large estate was devised in trust for his children and grandchildren, with full discretion to his trustees as to the mode of applying the income for the benefit of the persons intended to be benefited thereby.

In June, 1876, S. K. Williams, the son, became bankrupt; and the complainant was appointed assignee of his estate, and brought this bill, asking the court to declare him entitled to the annuity, or to so much thereof as should be found not necessary for the purposes named. The bankrupt has a wife and seven children.

W. B. Durant, pro se. All rights in equity pass by the assignment: Rev. Stats. § 5046.

(a.) Trusts cannot be created with a proviso that the interest of the *cestui que trust* shall not be alienated, or be liable for his debts: Lewin, Trusts (6th ed.), 89; *Rugeley v. Robinson*, 10 Ala. 702; *Robertson v. Johnston*, 36 id. 197; *Dick v. Pitchford*, 1 Dev. & B. Eq. 480; *Re Jones's Will*, 23 Law Times, N. S. 211; *Rochford v. Hackman*, 9 Hare, 475; *Graves v. Dolphin*, 1 Sim. 66; *Blackstone Bank v. Davis*, 21 Pick. 42; *Sanford v. Lackland*, 2 Dillon, 6; *Brandon v. Robinson*, 18 Ves. 429; *Heath v. Bishop*, 4 Rich. Eq. 46.

(b.) Bankruptcy is not an alienation under such a proviso: *Lear v. Leggett*, 2 Sim. 479; *Whitfield v. Prickett*, 2 Keen, 608.

(c.) Such trusts, to be effectual, must be protected by a clause of cesser, limitation over, or absolute discretion in the trustee: *Snowdon v. Dales*, 6 Sim. 524; Lewin, Trusts, 90, and cases; *Sanford v. Lackland*, *Graves v. Dolphin*, *ubi supra*.

(d.) A trust for clothing or support is no exception: *Green*

v. *Spicer*, 1 Russ. & M. 395; *Younghusband v. Gisborne*, 1 Coll. Ch. 400; *Havens v. Healey*, 15 Barb. 296; *Smith v. Moore*, 37 Ala. 327. The distinction in *Twopeny v. Peyton*, 10 Sim. 487, and *Godden v. Crowhurst*, 10 Sim. 642, is, that the trustees were themselves to apply the funds.

(e.) This annuity is not a trust for support; the words only explain the purpose or motive of the founder: *Spooner v. Lovejoy*, 108 Mass. 529; *Thorp v. Owen*, 2 Hare, 607; *Harper v. Phelps*, 21 Conn. 257; *Lamb v. Eames*, L. R. 6 Ch. 597; *Paisby's Appeal*, 70 Penn. St. 153.

We maintain that there cannot be a trust upon a trust, and, therefore, that the bankrupt takes the income, during his life, discharged of all trusts.

(f.) If the bankrupt takes the income in trust, we are to have his part of it: *Rippon v. Norton*, 2 Beav. 63; *Mason v. Mason*, 2 Sandf. Ch. 432; *Rugeley v. Robinson*, *ubi supra*.

The costs of all parties should be paid out of the fund: *Younghusband v. Gisborne*, *ubi supra*; *Abbott v. Bradstreet*, 3 Allen, 587.

H. C. Hutchins & E. W. Hutchins, for the defendants. 1. So far as this income is to be applied to the support of the bankrupt's wife and children, it is inalienable by him, and not liable for his debts: *Chase v. Chase*, 2 Allen, 101; *Raikes v. Ward*, 1 Hare, 445; *Crockett v. Crockett*, *id.* 451; *Woods v. Woods*, 1 Myl. & C. 401; *Broad v. Bevan*, 1 Russ. 511, *note*.

2. We go farther, and say, that, where the trust is to maintain the husband jointly with the wife and children, the assignee of the husband will not be entitled to any thing: Robson, Bankruptcy (3d ed.), 397; *Godden v. Crowhurst*, 10 Sim. 642. It is impossible for a master to say what is necessary, and still more what may hereafter become necessary, for a large and growing family.

3. By the American decisions a trust may be made for the settlor's son and grandchildren, without power of alienation and without liability for the son's debts: *White v. White*, 30 Vt. 338; *Bramhall v. Ferris*, 14 N. Y. 41; *Wetmore v. Truslow*, 51 N. Y. 338; *Locke v. Mabbett*, 3 Court of App. (Abbott) 68; *Pope v. Elliot*, 8 B. Mon. 56. The leading case is *Brandon v. Robinson*, 18 Ves. 429; and the reasoning is not satisfactory, and has not

been accepted in this country : see, besides cases above cited, *Nichols v. Eaton*, 91 U. S. (1 Otto) 716; *Rife v. Geyer*, 59 Penn. St. 393; *Wells v. McCall*, 64 id. 207. The case cited from New York has been overruled: *Graff v. Bonnett*, 31 N. Y. 9; *Campbell v. Foster*, 35 N. Y. 361; *Genet v. Beekman*, 45 Barb. 382.

LOWELL, J. How far the law of this country generally, or of Massachusetts in particular, conforms to the doctrine of *Brandon v. Robinson*, 18 Ves. 429, I do not care to consider. The question is at this time before the supreme judicial court of the State, if I am rightly informed, and is likely to be settled in due course; but I consider this case to be governed by *Nichols v. Eaton*, 91 U. S. (1 Otto) 716.

The annuity given to the bankrupt was given him in trust for the uses set forth in the contract with the defendant company. It was argued that those words were the expression of a motive, or a wish, on the part of the donor; but they are the language of command, and there is nothing precatory about them. The payments are to be made to the bankrupt, and after his death to his wife, "the income thereof to be applied to the support of said Samuel K., Jr., and of his said wife, and the education and support of their children;" and, again, the company agree to pay the income to the bankrupt or his wife, "in the order and for the purposes aforesaid." No doubt his receipt is a discharge, and the company take care not to be responsible for the application of the money; but that application is ordered, and the wife and children, or any of them, could maintain a bill against the bankrupt for its enforcement: *Whiting v. Whiting*, 4 Gray, 236; *Chase v. Chase*, 2 Allen, 101; *Loring v. Loring*, 100 Mass. 340; *Cole v. Littlefield*, 35 Maine, 439; *Wright v. Miller*, 8 N. Y. 9; *Lucas v. Lockhart*, 10 Sm. & M. 466. The point is well put by Mr. Perry, in his excellent work on Trusts, § 117, that the question to be decided is, whether the settlor intended to impose an obligation, or only to assign the motive for an absolute gift. And I say again, the language is not at all doubtful here; the son, in the first instance, and his widow, if she should survive him, are to take this income and apply it to the purposes mentioned. I agree with a note of Mr. Perry's to the same section, that the tendency of the later cases is to seek, somewhat less astutely

than formerly, to discover trusts in precatory words; but in no case, late or early, that I have seen, are words like those in this case treated as precatory.

A doubt was suggested in argument whether a trust could be grafted on a trust. Some inconveniences in the working of such a sub-trust were mentioned in a Massachusetts case: *Rich v. Rogers*, 14 Gray, 174; but the court, in the later case of *Chase v. Chase*, 2 Allen, 101, found them not insuperable. And in all the cases above cited in which an annuitant or life-tenant has been held to be a trustee, the *corpus* of the property was already in trust, and he was only a sub-trustee, as he is called in *Chase v. Chase*, *ubi supra*.

Nor is there any difference between a settlement *inter vivos* and a will, in the creation of a trust, excepting that a greater latitude of construction is allowed in ascertaining the intent of a testator, who is supposed to labor under some disadvantages for expressing his meaning, as compared with one who is drawing up a marriage settlement, or entering into one of the more deliberate transactions of life. As there is no obscurity in the language of this instrument, the difference is unimportant.

Then the question remains: What interest have the creditors of S. K. Williams, Jr., in this annuity? It was conceded at the argument, and is the law, that whatever Williams could have assigned, or his creditors could have reached by any proceedings in equity, can be made available by his assignee for the payment of his debts. There are cases in which the courts have inferred from the terms of the settlement, or from the situation of the parties, that the beneficiaries were to take equal shares, *per capita*. One of the earliest of these cases is *Rippon v. Norton*, 2 Beav. 63; but the propriety of the decree in that case was questioned in *Wallace v. Anderson*, 16 Beav. 533; and such an artificial mode of division could not have been contemplated, and would not be just, in the existing circumstances of this family. There are other cases in which an inquiry has been ordered before a master into the necessities of the wife and children, with an intimation that whatever was not wanted for their support and education would belong to the assignee. Where, however, the trustees have a discretion by which they may deprive the debtor of income alto-

gether, I understand the modern doctrine in England to be that the assignee in bankruptcy will take only what, if any thing, the trustees actually appropriate to the debtor: *Lord v. Bunn*, 2 Y. & Coll. 98; *Kearsley v. Woodcock*, 3 Hare, 185; *Trappes v. Meredith*, L. R. 10 Eq. 604, reversed on another point, L. R. 7 Ch. 248.

In England, the assignees in bankruptcy formerly acquired all the debtor's property, present and future, until his discharge; and even now they take it until his discharge, or the close of the proceedings in bankruptcy, whichever event may first occur; and, by the insolvent law, under which some of the decisions were made, his person only was discharged, and the assignees took the whole property, until the debts were fully paid. Under this system it was possible for a court of equity to shape its decrees from time to time to meet events as they occurred. If, for example, the children died or were emancipated, and the trusts as to them were accomplished, it could decree a larger amount to the assignee; and, if more children were born, might vary the decree in an opposite sense. But the assignee under our bankrupt law takes at once whatever interest is assignable, and must sell it promptly in his turn; and what I have to decide is, whether I can decree that any specific part of this annuity has come into his hands to be disposed of in that way.

In principle and reasoning, this case, as I have already said, is governed by *Nichols v. Eaton*, 91 U. S. (1 Otto) 716. There the trustees had a full discretion how to dispose of the income; and it was held that the assignee took nothing. I think the debtor in this case has such a discretion, from the very necessity of the case. The trust does not depend upon the person of the trustee; and I am inclined to think that the supreme judicial court would have power to appoint some other person to receive this income, if it were shown that by reason of his insolvency and its consequences, or for any other reason, the debtor had become unfit to fill the office of trustee; and I think such a new trustee would have a full discretion in the appropriation of the income.

If this is not so, but the bankrupt is entitled to some part of this income, yet I think it impossible for any court to say what that part is; for the reason that it may be a constantly varying quantity, and that it would be both impracticable and unjust

for me to undertake to decree to the assignee an interest for the life of the bankrupt in any such aliquot part. It is plain that if I cannot do that, I cannot give him any thing which will be of value to the creditors. No doubt this amounts to saying that the bankrupt will have some benefit from the trust; but this is the actual result of the English decisions concerning discretionary trusts, which is approved and followed in *Nichols v. Eaton, ubi supra*. This effect is pointed out by Mr. Robson, in his work on Bankruptcy (3d ed.), p. 396; and I do not see how a court can prevent it.

The case is a hard one for the creditors; and I shall be willing to hear the parties further on the question of costs, which was but very briefly touched upon in the argument.

Bill dismissed (question of costs reserved).

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1. Under the statute limiting the liability of ship-owners, there is no freight pending in a voyage for catching whales. *The Ontario*. — *The Helen Mar*, 40.
2. Where the charterer's agent was to have a commission on freight at the port of discharge, this is to be reckoned on the freight received, and not on the gross freight list, some of which could not be collected. *Mauran v. Warren*, 53.
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BANKRUPT LAW.

ACTS OF BANKRUPTCY.

1. A trader who cannot pay his debts as they mature in the ordinary course of his business is insolvent. *Sawyer v. Turpin*, 29.
2. The stockholders of a trading corporation agreed to lend money to the company in proportion to their several shares. One of them made the loan by giving his note, which the company indorsed, and agreed with him to provide for at maturity. They failed to take up the note when it became due, and the promisor paid it within fourteen days after its maturity. *Held*, that there had been no suspension of the commercial paper of the company for fourteen days. *Re The Massachusetts Brick Co.*, 58.
3. Where stockholders were to advance money to the company in proportion to their interests, and did so advance it for four months, and all but one of them afterwards extended their loans for one year, in accordance with what the treasurer testified was an understanding at the time the loans were made, and the company paid all its trade debts as they matured, and was in good credit, whether it could be properly considered insolvent, *quære. Ib.*

4. At a meeting of the stockholders, who were also the principal creditors of the company, it was voted unanimously to give a mortgage to one of the stockholders to secure him for advances made beyond his proportion. The petitioner, who was a stockholder and creditor, was present and made no objection. *Held*, he was estopped to set up the mortgage as an act of bankruptcy by the corporation. *Ib.*
5. One who permits himself to be held out as a partner may be made bankrupt as a member of the firm at the suit of creditors. *Re Krueger*, 66.
6. One who contracts with a railroad company to grade and build its road is not, by virtue of such contract and his acts under it, a merchant or trader within sect. 39 of the bankrupt act; and the suspension of his commercial paper is, therefore, not an act of bankruptcy. *Re Smith*, 69.
7. A person cannot commit an act of bankruptcy while insane; but if when sane he has committed such an act, he may be made bankrupt upon a petition *in invitum*, after he has become insane. *Re Pratt*, 96.
8. Where one partner of a firm, which had been dissolved, petitioned for an adjudication of bankruptcy against himself and his late copartner, and it appeared that the petitioner had undertaken to pay all the joint debts, and had given a bond to the defendant, with a solvent surety, conditioned for such payment, and that the creditors did not desire an adjudication, and that the defendant was solvent, — *Held*, that the petition must be dismissed. *Re Bennett & Amos*, 400.
9. A partner petitioning, under such circumstances, against himself and his copartner, must prove that the latter is insolvent in the ordinary sense of being unable to pay his debts, including the joint debts. *Ib.*
10. *Semble*, the court would have power to retain such a petition until the solvent copartner should have paid the joint debts. *Ib.*
11. A bankrupt, who has not been discharged, or to whom a discharge has been refused, and who has contracted new debts, may file a new petition in bankruptcy.
Semble, that whenever an involuntary petition may be sustained, a voluntary petition may be. *Re Drisko*, 430.
12. An involuntary petition must be signed by one-third in value of all the creditors, and one-fourth in number of creditors whose debts exceed \$250; if there are none such, or if a sufficient number of them do not petition, the one-fourth in number may be made up from the smaller creditors. It is not necessary that the larger creditors should refuse to sign; it is enough that they do not sign. *Re Currier*, 436.
13. A proceeding in bankruptcy by a partner against his copartner is not an involuntary proceeding within § 9, St. 1874, c. 390. *Re Wilson*, 453.

See BANKRUPT LAW: Preferences, 9, 10.

RIGHTS, DUTIES, &c., OF THE BANKRUPT.

1. A bankrupt has a standing in court to object to the confirmation of assignees of his estate. *Re McGlynn*, 127.
2. Section 26 of the bankrupt act authorizes the examination of the bankrupt, and of any one who is believed to have important information touching the
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estate, trade, or dealings of the bankrupt, which may aid the assignee in the execution of his trust. *Re Krueger, Loud, & Co. — Ex parte Bugbee*, 182.

3. A person so examined is to disclose all matters touching the trade, &c., of the bankrupt; but is entitled to the usual privileges and exemptions. *Ib.*
4. *It seems*, that the bankrupt, since act of 25th February, 1868 (15 Stats. 37), could not refuse to testify on the ground that his answers might criminate him in the federal courts; but the privilege of communication between client and counsel extends to bankrupts and their legal advisers. *Ib.*
5. Mere neglect of an insolvent person to go into bankruptcy is no fraud within the statute. *Partridge v. Dearborn*, 286.
6. A bankrupt, under examination by a creditor, is entitled to make any explanation or additional statements which may be necessary to complete and make clear any matters concerning which he has been examined; and, to this end, may be questioned by his counsel.
He is not bound to pay the fees of the register for taking this part of the examination. *Re Noyes*, 352.
7. The bankrupt is the trustee of his estate until the assignee is appointed. *Ex parte Tremont Nat. Bank. — Re George & Batley*, 409.
8. A bankrupt indorser may waive demand and notice upon a note maturing before the choice of an assignee. *Ib.*
9. *Seem*, that a bankrupt may sue for a claim before the appointment of an assignee, if immediate action is necessary; and a plea of the plaintiff's bankruptcy is not a bar to an action, if an assignee has not been appointed. *Ib.*
10. A bankrupt who has not been discharged, or to whom a discharge has been refused, and who has contracted new debts, may file a new petition in bankruptcy. *Re Drisko*, 430.
11. In composition cases, in which no assignee has been appointed, the debtor stands in the position of an assignee in respect to set-off. *Ex parte Howard Nat. Bank. — Re North & Co.*, 487.

See BANKRUPT LAW: Composition, 3; TRUSTS, 1.

RIGHTS, DUTIES, &c., OF ASSIGNEE.

1. An assignee in bankruptcy succeeds to the rights of creditors, and may maintain a suit to set aside a deed for fraud, actual or constructive, though the fraud be not one mentioned in sect. 35 of the bankrupt act. *Pratt v. Curtis*, 87.
2. An assignee in bankruptcy is the proper party plaintiff to impeach a deed given by the bankrupt, though only one class of creditors is interested to set it aside. *Ib.*
3. The court will not set aside the appointment of an assignee otherwise regular merely because the first meeting was held on Thanksgiving Day. *Re McGlynn*, 127.
4. B. contracted to deliver certain iron to A., in monthly instalments, on credit, and before the time came for delivering the first lot of iron, A. failed, and notified his creditors that he could only pay twenty-five per cent of the amount of his debts. At the meeting of creditors at which this offer was

- made, C. told B.'s agent that he would take the iron on A.'s behalf; but he did not offer to pay cash for it. *Held*, B. was not bound to accept the offer. *Re W. F. Wheeler. — Ex parte W. T. Carter & Co.*, 252.
5. Afterwards B.'s agent, with authority, wrote A. that B. would not deliver the iron unless his old debt were paid. A. took no notice of this letter, and afterwards went into bankruptcy. Neither A. nor his assignees in bankruptcy ever offered to pay cash for the iron or demanded its delivery; and there was no evidence that they were ever able or prepared to pay for it. *Held*, the letter of B.'s agent was not, under these circumstances, such a repudiation of the contract as would authorize A.'s assignee in bankruptcy to set off the value of the contract against B.'s debt provable in bankruptcy. *Ib.*
 6. Where the owners of a fishing-vessel became bankrupt, and afterwards the vessel arrived, and the assignees received the proceeds of the sales of the fish, — *Held*, they took them subject to the lien of the seamen. *Re Low. — Ex parte Baker*, 264.
 7. Where assignees sold a fishing-vessel for its full value, without taking into account any secret liens, and the purchasers were afterwards obliged to pay wages of some of the fishermen for the preceding voyage, — *Held*, the purchasers of the vessel were subrogated to the lien of the seamen against the fish and their proceeds, and might recover of the assignees such proportion of those proceeds as the wages so paid bore to the whole amount of wages. *Ib.*
 8. And in ascertaining the net proceeds of the fish, the assignees were permitted to deduct the necessary expenses of recovering a part of the value from an adverse claimant, who had taken the fish by replevin from the possession of the assignees. *Ib.*
 9. Where a creditor obtained a judgment for a debt not yet payable, and thereby obtained a lien by levy on the goods of the debtor, — *Held*, the lien was invalid against the assignee in bankruptcy of the debtor, though the circumstances did not prove a statute preference. *Partridge v. Dearborn*, 286.
 10. The bankruptcy of one partner, *ipso facto*, dissolves the partnership, and the assignee is tenant in common with the solvent partner in the joint stock. *Wilkins v. Davis*, 511.
 11. A court of equity may give either the solvent partners or the assignee the settlement of the joint affairs. *Ib.*
 12. By sect. 5099 of the Rev. Sts., the allowance of a reasonable compensation to an assignee for his services is within the discretion of the court of bankruptcy, which cannot be wholly regulated beforehand by the supreme court. This discretion is given to the court only, and not to the registers. *Ex parte Whitcomb. — Re Colwell*, 523.
 13. Assignees, intending to charge for services, beyond the fees mentioned in rule 30, must notify creditors of their intention in the notices of the meeting at which their account is to be presented. *Ib.*
 14. A conditional contract to deliver goods to a trader, upon payment for them, gives his general creditors no interest in them, unless there is a surplus, and therefore an arrangement to carry out such a contract is not fraudulent. *Sawyer v. Turpin*, 29.

15. The assignee in bankruptcy may designate a sum of money as "necessaries," under sect. 14 of the statute. *Re Hay*, 180.
16. An assignee in bankruptcy, who has taken chattels subject to a mortgage, has no lien on the chattels for rent of the place in which they were kept, if, being notified of the mortgage, he refused to deliver them to the mortgagee, and the rent accrued after such notice. *Re Pierce*. — *Ex parte White*, 343.
17. The principal of a bankrupt factor may recover from the assignee any goods remaining unsold, or any proceeds of the sale of such goods which the assignee has sold, or which can be specifically distinguished from the property of the bankrupt. *Nutter v. Wheeler*, 346.
18. It is the duty of the registers to examine and regulate the charges and expenses of assignees and counsel, whether any creditor objects to the account or not. *Re Sawyer*, 551.
19. Assignees have no moral right to spend money, which is not more than sufficient for the privileged creditors, in litigation for the benefit of the general creditors. *Ib.*
20. The charges of assignees for counsel fees and their own services considered. *Ib.*
21. Rights of assignee in property held in trust for bankrupt. *Durant v. Mass. Hospital Life Ins. Co.*, 575.

See Priority, 4; FRAUD, 1; PARTNERSHIP, 14, 15.

PROOF OF DEBTS.

1. A. was sued; and B., who owed him a debt, was summoned as his trustee (or garnishee), and defaulted, and afterwards went into bankruptcy, and A. proved the debt. Afterwards the attaching creditors obtained judgment and issued execution against A., and against his funds in the hands of B., and made demand on B. and on his assignees in bankruptcy to pay them the debt towards the satisfaction of the execution, which was refused. They then proved the supposed amount of the debt owed by B. to A. against B.'s estate in bankruptcy. *Held*, that they had no provable debt and were not creditors of B. at the date of the bankruptcy. *Ex parte Columbian Ins. Co.* — *Re Surette*, 5.
2. Whether the lien which they held for their debt by virtue of their attachments was absolutely dissolved, or might have been availed of in some way by applying to the equitable powers of the court, *quære?* *Ib.*
3. Whether if the first judgment alone, before *scire facias* brought, would have made them creditors of B., if recovered before the bankruptcy, *quære?* *Ib.*
4. A creditor who obtains judgment for his debt after an adjudication of bankruptcy has issued against his debtor, and takes out execution, cannot prove his debt in bankruptcy. *Re Gallison*, 72.
5. Where a firm gave to A. a receipt, not negotiable, and intended as a memorandum of indebtedness to him, and at his request one of the firm, who was treasurer of a manufacturing company, indorsed the paper in the name of that company, without any consideration moving to the company, — *Held*, the amount was not provable against the estate of the manufac-

- turing company in bankruptcy. *Re The Wrentham Manuf. Co. — Ex parte Southwick*, 119.
6. A married woman came to Massachusetts without her husband, he never having lived with her in the State, and contracted a debt as guarantor, for the accommodation of a friend, the debt having no connection with her separate estate or with her trade, and became bankrupt. The debt was admitted to proof against her assets. *Re Ruddell*, 124.
 7. A claim founded upon a covenant to repay part of a premium paid for a policy of insurance issued by a stock company, upon cancellation of the policy, is provable in bankruptcy, in the absence of provisions in the State laws, the charter or by-laws of the company, which would make it void. *Re The Independent Ins. Co. — Ex parte Nickerson*, 187.
 8. The actual insolvency of the company before bankruptcy does not discharge such a covenant, or render its performance illegal. *Ib.*
 9. *It seems*, that, if the interests of the estate require it, debts may be admitted to proof without affidavit, *if no creditor objects*; also, that several debts may be admitted upon one affidavit. *Ib.*
 10. The practice of procuring creditors who have small privileged debts for wages, to prove their debts at the first meeting, and vote for assignee, is disapproved. *Re Houghton*, 243.
 11. The fee of the register, for taking and certifying a deposition in proof of debt, is one dollar. This fee is a charge on the fund; but a fee for a letter of attorney given by a creditor is not. *Ib.*
 12. A parcel of goods was warehoused in the name of C., a broker, and was sold by A., the owner, to B., and a receipted bill given, and a negotiable promissory note taken for the price, which note was signed by B., and indorsed by D. for B.'s accommodation. B. and D. failed before the note became due. Notice of the sale had been given to C., but not to the warehouseman. *Held*, A. was not bound to surrender the note, but might require the goods to be sold and indorse the amount of the proceeds upon the note, and prove against the estates of B. and D. for the balance. *Re Batchelder. — Ex parte Luce*, 245.
 13. Amendment of proof made under mistake. *Ib.* 249.
 14. A joint and several note, signed H. & Co., A., B., was given for money borrowed by the firm of H. & Co., and the two last signers were sureties. *Held*, it could be proved against the joint assets of H. & Co. in bankruptcy. *Re Holbrook. — Ex parte Windham Prov. Inst.*, 259.
 15. A joint and several note, signed by the three partners of H. & Co., in their individual names, and by A., B., and C. as sureties, is the joint note of all and the several note of each signer, but not the joint note of H. & Co., and cannot be proved as against the joint assets. *Ib.*
 16. Where one partner gives security on his separate property for a joint debt of the firm, the creditor may prove for the full amount against the joint estate of the firm in bankruptcy, without surrendering, selling, or valuing his security. *Ib.*
 17. But where one partner gives such security to sureties, to indemnify them against liability for his separate debt, the separate creditor must cause the security to be applied, and prove only for the deficiency. *Ib.*
 18. Where A., holding the bare legal title to a note given by a debtor, proved

- it against the debtor's estate, after deducting the price of certain goods for which he owed the debtor, — *Held*, he had proved too little, and that his proof should be expunged without prejudice to his proving the note in full as trustee for the equitable owner, or to a proof by such owner. *Re Lane, Brett, & Co. — Ex parte Dreyfus*, 306.
19. If the indorser of a note pays a part of the money due upon it to the holder, after the bankruptcy of the maker, for a full release of his (the indorser's) own liability, the holder may prove the note in full against the estate of the maker, and will hold for the benefit of the indorser any dividends he may receive above the balance remaining due him on the debt. *Re Souther. — Ex parte Talcott*, 320.
 20. A fourth general meeting of a bankrupt's creditors having been called after the lapse of about five years from the date of the third, and of the bankrupt's discharge, for the purpose of declaring a dividend from assets unexpectedly realized, — *Held*, that a creditor, having a just debt, might prove it at that meeting, and receive dividends as provided by sect. 28, not disturbing the former dividends. *Re Robinson*, 326.
 21. Where a firm, composed of A. and B., was indebted to a firm composed of B. and C., and the former firm became bankrupt, — *Held*, that C., as the remaining member of the latter firm, settling its affairs, could prove the debt against the assets of A. and B. *Re Buckhause. — Ex parte Flynn*, 331.
 22. No proof can be made in bankruptcy between the joint and separate estates of copartners. *Re Lane, Brett, & Co. — Re Boynton*, 333.
 23. Where money was advanced by A. to B. for capital in trade, with the understanding that B. should not be pressed for payment, but with no binding contract delaying or deferring payment, and no misrepresentation was made to B.'s creditors, A. was held entitled to share in the dividends of B.'s estate. *Ib.*
 24. The costs of an attachment, laid by the wife of the bankrupt in a libel for divorce, are not provable in bankruptcy, and are not an equitable charge against the assets in the hands of the assignee. *Re Foye*, 399.
 25. The filing a petition in bankruptcy by a corporation, *ipso facto*, dissolves a contract with an employee, and is tantamount to a notice of its dissolution; and he may have his damages assessed, and prove the amount in bankruptcy. *Ex parte Pollard. — Re Eliot Felting Mills*, 411.
 26. *Semble*, that damages for the breach of an implied contract may be proved in the same way. *Ib.*
 27. If an absolute contract is broken, so that a cause of action has arisen, it is no objection to assessing and proving the damages in bankruptcy, that they may be difficult of estimation; though, where the debt is contingent, and the contingency has not happened, that consideration may be decisive against the proof. *Ib.*
 28. Security was given by a principal debtor to secure his surety, and both principal and surety became insolvent. Equities, application of security, and proofs. *Ex parte Morris. — Re Foye*, 424.
 29. *Semble*, that where a bankrupt who has not been discharged, or to whom a discharge has been refused, files a new petition in bankruptcy, those who were creditors when the first petition was filed may prove their old debts against the assets in the new bankruptcy. *Re Drisko*, 430.

30. A preferred creditor cannot prove his debt, or any part of it, until he has voluntarily or by compulsion surrendered his preference. *Re Currier*, 436.
31. A mere agent to prove a note in bankruptcy, must prove it in the name and in behalf of his principal, if proof in his own name is objected to. *Re Saunders*, 444.
32. A proof of debt, in the mode required by statute, establishes a *prima facie* case, even under objection, and subject to counter proof, or to an order of court for further proof, without producing such evidence of handwriting, &c., as would be necessary in the trial of an action. *Ib.*
33. A creditor of a firm, of which a member becomes bankrupt, may prove against the separate estate of the bankrupt, and may vote for assignee. *Wilkins v. Davis*, 511.
34. Where copartners were lessees of a building, and bound by covenants to pay rent for several years, and two of the partners left the firm, and the others, with some new partners, assumed the debts and liabilities, and the new firm became bankrupt, — *Held*, that the retired partners had not the right to prove against the estate a claim for unliquidated damages by reason of their liability on the covenants of the lease, unless there were some special stipulation for such a contingency contained in the lease. *Ex parte Lake. — Re Whiting, McKenna, & Co.*, 544.
35. A provision in a lease, that the lessors might re-enter and re-let the premises at the risk of the lessees, who should remain liable for the rent and be credited with the sums actually realized, will not authorize a proof for unliquidated damages against the estate of the bankrupt lessees by the lessors who have re-entered and re-let the premises at a less rent than before. *Ib.*
36. A manufacturer consigned goods to his factors, drew against them bills, which the factors accepted, and both parties became bankrupt, leaving outstanding acceptances for about \$116,000, and goods and their proceeds in the hands of the factors for about \$26,000. The factors employing, without objection, the \$26,000, made a composition of forty per cent with all their creditors, including the holders of the bills, who reserved the right to prove in full against the drawer and all other parties. *Held*, these creditors, proving against the drawer, need not give credit for the full forty per cent., but must abate their proof in the proportion of 90,000 to 116,000; that is, must give credit for the \$26,000, which might, upon their application, have been applied towards paying their bills. *Ex parte Harris, Chipman, & Co. — Re Cochran*, 568.
37. Where notes were exchanged, and the holder had received a payment from the maker of one of these notes before he offered proof against the estate of the indorser, he can prove only for the balance. *Ib.*
38. The proof is complete when the affidavit is filed with the register or assignee, and payments received after that time need not be credited. *Ib.*
See BANKRUPT LAW: Preferences, 11, 12; PARTNERSHIP, 4, 5.

PRIORITY.

1. A person who advances his own money for the fees in bankruptcy, has a first lien on the assets for its repayment. A mortgage to secure the
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- advance gives no additional security, and is useless. *Whiston v. Smith*, 101.
2. The assignee of a mortgage given to a surety to indemnify him for undertaking to secure debts of the mortgagor, if he is himself a creditor under the mortgage, has no priority over the other creditors, but must share with them if the security is inadequate to full payment. *Re Pierce*. — *Ex parte White*, 343.
 3. A person employed for a temporary service, in adjusting the books and accounts of a bankrupt, within six months before the bankruptcy, has a privileged debt against the estate for services as clerk to the extent of fifty dollars, under sect. 5101, Rev. Sta. *Ex parte Rockett*. — *Re Taylor*, 522.
 4. Assignees are bound to pay the privileged debts as soon as money can be realized for the purpose. *Re Sawyer*, 551.

See BANKRUPT LAW: Composition, 11; Set-off, 2; SURETY.

PREFERENCES.

1. A change in the form or even the substance of a security, within four months of bankruptcy, is protected, if the first security was unimpeachable, and no greater value is given the creditor than he had before. *Sawyer v. Turpin*, 29.
2. If a trader, knowing he is insolvent, within four months of his bankruptcy gives security to a creditor who has reason to believe it, he makes an illegal preference. *Ib.*
3. The doctrine that, in equity, the court may give effect, upon equitable terms, to the valid part of a contract which is fraudulent in part, applied to a mortgage which was, in part, a preference. *Whiston v. Smith*, 101.
4. The conveyance of the joint assets of an insolvent firm to a continuing partner is a fraudulent preference by the bankrupt act; if made within four months of a petition in bankruptcy, it may be set aside by the joint creditors. *Re Johnson & Stowers*, 129.
5. The surrender of a policy of insurance, in accordance with the covenant therein contained, cannot be a preference of the assured. *Re The Independent Ins. Co.* — *Ex parte Nickerson*, 187.
6. A payment, by an insolvent debtor, of a percentage on claims of a part of his creditors which does not lessen the percentage which his other creditors will receive, is not a preference. *Re Hapgood*, 200.
7. A fraudulent preference cannot be committed by the mere neglect of an insolvent debtor to go into bankruptcy. *Partridge v. Dearborn*, 286.
8. Where A., holding several notes of B., exchanged some of them for notes of like amount of a firm in which B. was a partner. *Semble*, this arrangement, if made in contemplation of bankruptcy, would be a fraud on the joint creditors; but, *held*, it could not be set aside when the bankruptcy of the firm occurred more than four months afterwards. *Re Lane, Brett, & Co.* — *Re Boynton*, 333.
9. A preferred creditor cannot proceed for adjudication against his debtor for the act of preference to which he is a party, and is not to be reckoned in determining whether or not the requisite proportion of creditors have

joined in an involuntary petition, or in computing the number or amount of those who have petitioned. *Re Currier*, 436.

10. A mere repayment to the debtor by a preferred creditor cannot, for the purpose of enabling such creditor to be counted in ascertaining the number to petition *in invitum*, take the place of a surrender of his preference to the assignee. *Ib.*
11. A preferred creditor may surrender his preference at the first meeting, and vote for assignee, when the preference is of such a nature as to be effectually destroyed by such a surrender. *Re Saunders*, 444.
12. A creditor who denies that he ever accepted a deed of trust made to a third person, the enforcement of which would give him a preference, and disclaims all interest in it, may prove his claim as unsecured. *Ib.*

See BANKRUPT LAW: Rights, Duties, &c., of Assignee, 9.

SET-OFF.

1. One who holds the bare legal title to a note given by a debtor cannot set off against it, in bankruptcy, a debt which he owes the bankrupt for goods bought. *Re Lane, Brett, & Co. — Ex parte Dreyfus*, 305.
2. Where A. was a creditor of a bankrupt for two distinct debts, and held shares of stock in pledge for one of them, with a statutory power of sale existing at the date of the bankruptcy, — *Held*, he could apply the surplus proceeds of the shares, after paying the first debt, to the payment of the second. *Ex parte Whiting. — Re Dow & al.*, 472.
3. A deposit in a bank becomes, upon the bankruptcy of the depositor, a security for and payment *pro tanto* of his liabilities to the bank, by the operation of the law of mutual credit. *Ex parte Howard Nat. Bank. — Re North & Co.*, 487.
4. The deposit should be set off against the aggregate amount of the notes of the bankrupt on which he is principal debtor, or on which, he being indorser, the real principals are insolvent. *Ib.*
5. *Semble*, if a bank has contingent or unliquidated claims against a bankrupt depositor, his deposit may be retained by the bank until it is ascertained what the provable debt is, if any, and then it can be used in set-off so far as is necessary. *Ib.*
6. In composition cases, in which no assignee has been appointed, the debtor stands in the position of an assignee in respect to set-off. *Ib.*

See BANKRUPT LAW: Rights, Duties, &c., of Assignee, 5.

DISCHARGE.

1. Where a creditor obtains judgment for his debt after an adjudication of bankruptcy has issued against his debtor, and takes out execution, the judgment will not be affected by the certificate of discharge; and such a creditor, therefore, cannot oppose the bankrupt's discharge. *Re Gallison*, 72.
2. If a person, when sane, commits an act of bankruptcy, and is made bankrupt upon a petition *in invitum*, after he has become insane, can he obtain a discharge? *Re Pratt*, 96.

3. Any creditor who has a provable debt against a bankrupt may apply to the court, after a year and perhaps earlier, to require the bankrupt to have the question of his discharge determined. *Re Fowler*, 122.
4. If a bankrupt has applied for his discharge, and given due notice, but has neglected to procure an order granting the discharge, it is not usually permitted to a creditor, who neglected to file objections in due time, to come in and file charges in opposition. The rights of all parties have already been fixed, and the mere neglect to take out an order ought not to prejudice the bankrupt. *Ib.*
5. If, in such case, a creditor discovers frauds, he may require the bankrupt to take his discharge, if he chooses to do so, and the creditor will then have his remedy by applying to annul it. *Ib.*
6. The two years within which a creditor may have discharge set aside begins when the debtor actually takes his discharge; but the previous knowledge which is to bar the creditor's right to annul must be knowledge which he could have availed of, that is, such as he had before the return-day of the order, to show cause why the discharge should not be granted. *Ib.*
7. A creditor has no absolute right to appear and oppose the discharge of a bankrupt, after the return-day of the order to show cause, though the proceedings may have been adjourned for other purposes. *Re Houghton*, 328.
8. But it is within the power of the court to permit opposition to be made at any time before the discharge is granted. *Ib.*
9. If a creditor who has duly filed specifications of opposition to the bankrupt's discharge is about to withdraw them, another creditor may be permitted to support them. *Ib.*, and *note*.
10. Statute of 22d June, 1874, § 9, concerning the conditions upon which a discharge is to be granted to bankrupts, applies to cases pending when the act was passed. *Re Griffiths*, 340.
11. A farmer, who occasionally bought and sold horses, cattle, and hay, is not a tradesman within the bankrupt act, and as such bound to keep books, within section 29 (Rev. Sta. § 5110), to entitle him to a discharge. *Re Côté*, 374.
12. Where a surety of the bankrupt, upon a bond to dissolve an attachment, paid the debt of a creditor who was opposing the bankrupt's discharge, the only motive of the surety being, by procuring the discharge, to save his own liability on other bonds held by creditors who had not objected, and the bankrupt had no part at all in the payment, — *Held*, this payment was not made by the bankrupt, or in his behalf, under section 29, and would not vitiate his discharge.
It seems, that any act or neglect of the bankrupt, which, if duly objected and proved, would have prevented his discharge, will be ground for setting it aside, under section 34, although such act or neglect may not have been fraudulent in the usual sense. *Ex parte Briggs*. — *Re Smith*, 389.
13. *Seemle*, that where a bankrupt who has not been discharged, or to whom a discharge has been refused, files a new petition in bankruptcy, a discharge under the new petition would apply only to new debts, and to such old debts as had been proved anew. *Re Drisko*, 430.
14. A discharge may be refused *nunc pro tunc* where the parties had neglected to have the order entered at the time the decision of the court was announced, but had acted on the theory that the order was in force. *Ib.*

15. *Semble*, that congress has not expressed the intent that a fraud, committed before the bankrupt act was passed, should be ground for refusing discharge. *Re Jones*, 451.
16. A fraud at common law, or under the statutes of the State, may be objected to a discharge, if it was committed so recently that it would affect any of the creditors who can come in under the bankruptcy. *Ib.*
17. If the assent of a creditor to the discharge of a bankrupt is procured by a pecuniary consideration moving from a third person, with no conceivable motive but to benefit the debtor, the presumption is very strong that the payment was made in behalf of the bankrupt. *Re Whitney & Munson*, 455.
18. Where a creditor, whose debt, after being proved, had been bought for more than its value by the brother of one of a bankrupt firm, signed an assent to the discharge of both bankrupts, and there was a signature later than his, under circumstances which proved that the assent was influenced by the purchase, — *Held*, that the privity of the bankrupt to the fraud was immaterial, and the bankrupt's discharge was refused. *Ib.*
19. Where an assent to the discharge of two bankrupt partners was written on one piece of paper, and the signature of a creditor was procured by a pecuniary consideration in behalf of one bankrupt, — *Held*, that neither could be discharged. *Ib.*
20. A partner, who is in bankruptcy upon the petition of his copartner, cannot obtain his discharge without the assent of creditors or the amount of assets required in voluntary proceedings. *Re Wilson*, 453.
21. If a member of a firm obtains his discharge in bankruptcy, he is released from liability for his joint as well as his separate debts. *Wilkins v. Davis*, 511.
22. The partners of the bankrupt are bound by the discharge as well as the joint creditors. *Ib.*
23. A creditor of a firm of which a member becomes bankrupt may object to the bankrupt's discharge. *Ib.*

See PRACTICE, 1, 2, 3, 5.

COMPOSITION.

1. A resolution of composition, by which the creditors resolve to accept payment in notes, is bad in substance. *Re Langdon*, 387.
2. *Semble*, that the payment may be made by instalments, which may be secured by notes. *Ib.*
3. Every creditor, authorized to vote at a meeting for composition, has a right to make suitable inquiries of the debtor. *Ex parte Jewett. — Re Morris*, 393.
4. How this right is to be reconciled with that of the meeting to regulate its own proceedings, *quære?* *Ib.*
5. Until these rights are found to be irreconcilable, it is the duty of the court to refuse to record a resolution passed at a meeting at which a creditor's right of inquiry was, by a vote of the meeting, postponed, against his will, until after the resolution had been voted on. *Ib.*
6. Where a creditor, believing in good faith that a larger offer might be made by a compounding debtor, bought up enough of the debts to prevent the

- acceptance of the resolution, publicly offering to pay at the same rate for all other of the debts, — *Held*, he could vote upon the debts so bought. *Ib.*
7. In deciding whether a composition should be approved or rejected, it should be compared with what the creditors would receive through an assignee, not with what the debtor might possibly be able to pay them. *Re Whipple*, 404.
 8. The act of congress puts upon the judge the responsibility of approving or rejecting a composition. *Ib.*
 9. It cannot be assumed that any composition accepted by the required proportions of creditors is preferable to bankruptcy. *Ib.*
 10. Second offer allowed to be made, the first having been rejected. *Ib.*, *note*.
 11. Privileged creditors, whose claims will be paid in full, to the extent of fifty dollars, there being sufficient assets for the payment of them, should be permitted to vote for a composition only on the excess of their debts over fifty dollars. *Re O'Neil*, 470.
 12. Where a creditor was paid to give up his threatened opposition to a composition, — *Held*, the resolution was void, though a sufficient number of creditors had accepted it; and there was no evidence that their action was influenced by his, nor that the debtor himself procured the payment to be made. *Re Sawyer*, 475.
 13. So where one who held the bankrupt's note was induced to sign the resolution by an expectation of advantage held out by the indorser, though what precise advantage was to be given did not appear, nor that the bankrupt had any thing to do with it. *Ib.*
 14. The word "creditors," in the section of the bankrupt act relating to composition, means all whose debts are provable in bankruptcy. *Ex parte Trafton*. — *Re Trafton*, 505.
 15. A mistake, without fraud, made by the debtor in his statement of the amount due to a creditor, will not vitiate a composition, and the true amount of a disputed claim may be proved by the creditor. *Ib.*
 16. The court may provide for an unliquidated claim in composition cases, as if the case were in bankruptcy, by permitting the prosecution of a pending action in the State court, or by ordering an inquiry in the matter at the bar of the bankruptcy court. *Ib.*
 17. When an application is made to set aside a composition once recorded, and to proceed in bankruptcy, notice should be given to all the creditors as well as to the debtor. *Ex parte Hamlin*. — *Re Brodt*, 571.
 18. When a composition, partly carried out, is set aside, all acts which have been regularly done in pursuance of the resolutions are valid, and the assignment to an assignee in bankruptcy should contain a proviso to that effect. *Ib.*
 19. Creditors receiving their respective shares of a composition are not bound to see that other creditors receive their shares. *Ib.*
 20. *It seems*, that a creditor, who knows that a composition is being carried out, and that the creditors are being paid, and makes no effort to obtain his own share, will be estopped to object to these payments. *Ib.*

See ATTACHMENT, 1; BANKRUPT LAW: Set-off, 6; PRACTICE, 20, 21, 22.

PRACTICE IN BANKRUPTCY.

See PRACTICE.

BILLS, NOTES, AND CHECKS.

1. A receipt, not negotiable, and intended as a memorandum of indebtedness by the maker thereof to the holder, does not come within the rule of law in Massachusetts, that one who indorses a note, not being a holder of it, is an original promisor. *Re The Wrentham Manuf. Co. — Ex parte Southwick*, 119.
 2. If the indorser of a note pays a part of the money due upon it to the holder, after the bankruptcy of the maker, the holder may still prove the face of the note, and will hold any dividends above the balance remaining due him on the debt in trust for the indorser. *Re Souther*, 320.
 3. Such payment is not a discharge of the maker, *pro tanto*. *Ib.*
 4. A bankrupt indorser may waive demand and notice upon a note maturing before the choice of an assignee. *Ex parte Tremont Nat. Bank. — Re George & Battey*, 409.
 5. Company A. was promisor, and Company B. was indorser, of certain promissory notes. Both companies became embarrassed, and Company A. agreed to sell all its property to C., who had been the treasurer of both companies, at any time within one year, when he should have paid all the debts of the company. Friends of C. subscribed money, and put it into the hands of D., as trustee, to enable him to buy up the notes of Company A. indorsed by Company B. *Held*, that the purchase of these notes by the trustee with the funds of the subscribers was not a payment of the notes. *Ex parte Balch. — Re Eliot Felting Mills*, 440.
 6. A representation by the holder of a note to the indorser that the note has been paid, does not discharge the indorser, who has been duly notified, unless he has suffered some loss or injury by reason of the representation. *Ib.*
 7. A contract by the holder of a note to give time to the maker must be a valid and enforceable contract, as against the holder, or it will not operate to discharge the indorser. *Ib.*
 8. If a bill is made and dated at the business domicile of the drawee, his undertaking is to pay it there, in case of dishonor, though it may have been negotiated elsewhere. *Ex parte Heidelberg. — Re Glyn*, 526.
 9. The treasurer or manager of a manufacturing corporation, established by the laws of Massachusetts, has authority, by virtue of his office, to give negotiable notes in the prosecution of the business of the company, but not for the accommodation of third persons; and if such an officer gives a note without authority, it is valid in the hands of an innocent purchaser for value before maturity. *Ex parte Estabrook. — Re Wood and Light Machine Co.*, 547.
 10. A *bona fide* purchaser is not bound to inquire into the character of a note which on its face is valid, and circumstances that would put a prudent man on inquiry will not affect the title of the purchaser of a note before maturity, if he did not in fact know of any defect in the title. *Ib.*
 11. Where notes are exchanged, the presumption is that each party is to pay his own. *Ex parte Harris, Chipman, & Co. — Re Cochrane*, 568.
- See BANKRUPT LAW: Proof of Debts, 19, 36, 37; DAMAGES, 14; PARTNERSHIP, 11.

BILL OF LADING.

1. An ordinary bill of lading implies an agreement that the goods shall be received within a reasonable time after the arrival of the vessel at her port of destination. *The Hyperion's Cargo*, 98.
2. Under the usual bill of lading, the lay days do not begin to run until the vessel has arrived at her place of discharge, and is ready to be unloaded. *Aylward v. Smith*, 192.
3. A shipper of goods has the right to have the bill of lading made to his own order; and, if the master has been instructed by the charterers not to sign such a bill, his only alternative is to reject the goods. He is not entitled to keep the goods and refuse to give such a bill. *The M. K. Rawley*, 447.
4. Where the property in goods shipped has passed to the vendee, the obtaining from the master, by the vendor, of a bill of lading to the vendor's order, will not re-vest the property in him, or transfer a good title to any one holding under such bill of lading. *Ib.*

BILL OF SALE.

See PLEDGE, 1.

BOTTOMRY.

1. Whether the maritime law of the United States requires a master to communicate with his owners before giving a bottomry bond, *quære*? It has never been decided that a separate communication must be made with the owners of the cargo before including it in the hypothecation. *The Eureka*, 417.
2. If a bottomry bond is given in good faith for necessary supplies, the objection of want of authority will only go to reduce the premium, so far as the ship is concerned, since by our law the ship is hypothecated without a bond. *Ib.*
3. Where the bond is taken by the agents of the ship, they may be bound to see to the application of the money. *Ib.*
4. Where the agents, taking a bond, advertised for bids, but gave a wholly insufficient notice, it was taken for granted that they feared a lower bid, and their premium was reduced. *Ib.*
5. Freight prepaid is not to be included in a bottomry bond. *Ib.*

CHARTER-PARTY.

1. In a charter-party made by a master of a vessel at a foreign port, it was stipulated, that, if the ship should put into a port of necessity, she should be consigned to the charterers or their agents, who were to pay disbursements, charging two and a half per cent commission on the amount, take care of the cargo, and have general charge of the business of the ship.
Whether a master can lawfully bind himself to consign the vessel to any particular person in case of disaster, *quære*? *Mauran v. Warren*, 53.
2. Where, in a port of necessity, the master did put his vessel in charge of the charterer's agent, — *Held*, the latter might properly require the master to

produce his accounts when applying for money; such being the usage of the port. *Ib.*

3. An agreement for quick despatch supersedes any custom of discharging vessels by which they are to take their turn at the wharf, and the naming a wharf in the charter-party, containing such a stipulation, amounts to an undertaking that the wharf shall be unincumbered. *Thacher v. Boston Gas-Light Co.*, 361.
4. *Semble*, that a charterer has the right to name any suitable and convenient wharf, which, when named, stands as if the name had been inserted in the charter-party. *Ib.*

See DAMAGES, 4; DEMURRAGE, 3; JURISDICTION, 5; PRINCIPAL AND AGENT, 2; USAGE, 1.

CLUB.

See INTERNAL REVENUE, 1.

COLLISION.

1. A whale-ship in the Arctic Ocean, which had been twice refitted at San Francisco, after the statute of 29th April, 1864, concerning collisions, was passed, and which could have procured the colored lights at that port, — *Held*, in fault for not having such lights, though her master had never heard of the statute. *The Ontario*. — *The Helen Mar*, 40.
2. A vessel having the right of way in the night-time, and not having the statute lights, is presumed to be in fault in respect to a collision with a vessel that should have seen her and given way. *Ib.*
3. The vessel bound to give way is likewise in fault, if by diligence and attention her lookout might have discovered the vessel that had not proper lights. *Ib.*
4. A vessel in motion and under command is presumed to be in fault, if a collision occurs between her and a vessel in a harbor in the daytime. *The Lady Franklin*, 220.
5. The laws of Massachusetts give to the harbor-master of Boston the power to designate places of anchorage for vessels in the harbor of Boston; and a place so designated is a proper place, though in the channel. *Ib.*
6. Those laws require all vessels to keep an anchor watch at all times, but the anchor watch is not bound to take any active measures to get his vessel out of the way of a vessel under command, approaching in broad daylight at the rate of eight knots, and is not bound to hail the approaching vessel, unless he discovers that his vessel is not seen. He has a right to suppose she will be seen. *Ib.*
7. A steamer and a schooner were approaching each other in the night-time, and the schooner neglected to show a torch, as required by statute; but the crew of the steamer saw the schooner at least as early as the torch ought to have been shown; and the collision appeared to have arisen from a mistake of the position of the schooner in the channel, and not from a failure to see the schooner. *Held*, the fault of the schooner did not contribute to the collision. *The Leopard*, 238.
8. A ship, manned by landsmen only, was to be moved to another part of the

harbor, and, when coming out of her dock in tow of a steam-tug, collided with a lighter which was made fast to another ship in the same dock. *Held*, the tug *prima facie* liable. *The Belknap*, 281.

9. Whether the tug would be liable if the fault were shown to be with the master of the ship, *quære?* *Ib.*
10. It is the duty of a vessel on the port tack to clear a vessel on the starboard tack. *The Mary Doane*, 428.
11. In thick or foul weather it is especially the duty of a vessel on the port tack to exercise all possible vigilance and care; there should be some one on deck competent to give necessary orders instantly upon an emergency. *Ib.* See *The Cambridge*, 21.

COMMISSIONS.

See MASTER, 2, 3; WHALING VOYAGE, 6.

CONFLICT OF LAWS.

See BILLS, NOTES, AND CHECKS, 8; DAMAGES, 14.

CONSIGNOR AND CONSIGNEE.

See AFFREIGHTMENT, 3; BANKRUPT LAW: Proof of Debts, 36; EVIDENCE, 10.

CONSUL.

Right to discharge seamen. See SEAMEN, 2, 7.

CONTRACT.

1. Whether the indorsement of a receipt, not negotiable, and intended as a memorandum of indebtedness by the maker thereof to the holder, by a third person, creates any contract between him and the holder, *quære?* *Re The Wrentham Manuf. Co. — Ex parte Southwick*, 119.
2. A promise to take the sole responsibility of one of two joint debtors is not void for want of consideration. *Re Johnson & Stowers*, 129; *Re Clap*, 226.
3. A. agreed to convey real estate, if certain conditions were complied with before the end of six months; the other party was not bound to fulfil the conditions, and did not do so within the time; meanwhile the property had risen considerably in value, — *Held*, that A. was not bound to convey, after six months. *Prentice v. Betteley*, 289.
4. The filing a petition in bankruptcy by a corporation, *ipso facto*, dissolves a contract with an employee, and is tantamount to a notice of its dissolution. *Ex parte Pollard. — Re Eliot Felling Mills*, 411.
5. Where one party to a contract becomes insolvent. *Re Wheeler. — Ex parte Carter*, 252.

See BANKRUPT LAW: Rights, Duties, &c., of Assignee, 4, 5; Proof of Debts, 25; DAMAGES, 14; EVIDENCE, 8; HUSBAND AND WIFE, 1; SALE.

CORPORATION.

See BILLS, NOTES, AND CHECKS, 9; JURISDICTION, 1.

COSTS.

1. When, in a collision case, both vessels were injured, and there was no ground for discriminating between them, the costs as well as damages were divided. *The Mary Patten*. — *The Star of the East*, 196.
 2. *It seems*, that if one party suffers all the damage, and both are in fault, the libellant recovering half damages should usually recover full costs. *Ib.*
- See BANKRUPT LAW: Proof of Debts, 24; *The William Gillum*, 154;
PARTIES, 1, 2.

CREDIT.

See OWNERS, 4, 5.

DAMAGES.

1. Where a vessel damaged by collision was sold at auction without sufficient examination of her condition, and without notice to the defendants, who had said they would do what was right about the collision, and it turned out that she might be raised and repaired conveniently, and without a large outlay, — *Held*, the owners could not recover for a total loss, but that the damages must be adjusted as upon a partial loss only. *The Cambridge*, 21.
2. In assessing the partial loss, an allowance may be made for the salvage which would have been paid if the owners had procured her to be brought in and repaired. *Ib.*
3. Demurrage allowed at the rate of eight cents a ton for every day's delay. *Ib.*
4. In a charter-party made by a master of a vessel at a foreign port, it was stipulated, that, if the ship should put into a port of necessity, she should be consigned to the charterers or their agents, who were to pay disbursements, charging two and a half per cent commission on the amount, take care of the cargo, and have general charge of the business of the ship. The charterer had the funds ready, and kept them ready, to pay the disbursements, and the master broke off the negotiations, and employed some one else. *Held*, the charterer might recover, as damages, the commissions agreed on. *Mauran v. Warren*, 53.
5. The measure of damages in an action by a charterer against the owner of a vessel for not proceeding to the port of loading is, usually, the increased freight and charges, if any, which the charterer has been obliged to pay in order to have his goods carried. The allowance of loss of profits on the goods is exceptional. *Oakes v. Richardson*, 173.
6. Interest allowed from the date of demand, upon evidence that the delay in proceeding was granted at the defendant's request. *Ib.*
7. In a collision cause, in which a steamer and a sailing-vessel were both found to be in fault, and the steamer, after the collision, had towed the schooner into port, — *Held*, an allowance might be made for towage, as part of the damage suffered by the steamer, but not for salvage. *The Mary Patten*. — *The Star of the East*, 196.
8. In assessing damages for a collision, a fishing-boat, making weekly trips or voyages for the market, which has lost a trip as the necessary result of the

injury, may be allowed the probable profits of the trip. *The Mary Steele*, 370.

9. These may be allowed when the only actual injury was to a seine, which could neither be repaired nor replaced in less time than a trip would require, and which was of so great value, that to assess it as a total loss would exceed the damage incurred by the loss of the trip. *Ib.*
10. Where A. was employed as superintendent of a factory by a written contract, which was to run for ten years, and the parties bound themselves to performance in the sum of \$10,000, liquidated damages, and, in an earlier arrangement of a like kind, had called the sum both a penalty and liquidated damages, — *Held*, a penalty. *Ex parte Pollard*. — *Re Eliot Felling Mills*, 411.
11. Interest not allowed as damages in a case of collision when the bills of repairs had not been actually paid at the time the cause was tried. *The Mary Doane*, 428.
12. If the master of a vessel injured by collision through the fault of the other party conducts himself with reasonable skill and diligence after the collision, the damages occurring from a necessary act, such as beaching his ship, will be chargeable to the wrong-doer. Such damages were allowed, though the master was informed that a better place for beaching his vessel was to be found.
The value of a boat, stolen from the master of the injured vessel, was disallowed, there being no necessary or probable connection proved between the collision and the theft. *The Nellie*, 494.
13. The rate of interest and damages which the drawee of a bill is to pay *ex morâ* is governed by the law of the place where the bill is drawn. *Ex parte Heidelberg*. — *Re Glyn*, 526.
14. Damages on a bill of exchange, as against the drawee, are a part of the law of the performance, and not of the execution and validity of the contract, nor of the remedy, and such a question arising in the courts of the United States, is one of general jurisprudence, and not of local law. *Ib.*

See BANKRUPT LAW: Proof of Debts, 25, 26, 27; SALVAGE.

DEALER.

See INTERNAL REVENUE.

DECK LOAD.

See USAGE, 4.

DECREE.

See LIEN, 13; PRACTICE, 10, 27.

DEFAULT.

See PRACTICE, 11, 12.

DELIVERY.

See PLEDGE, 2; SALE, 1, 2.

DEMURRAGE.

1. Where a vessel was consigned to a certain wharf, which was full when she arrived, and the consignee offered to receive the cargo at an adjoining wharf, which was safe and suitable, but the master insisted on waiting until the first-mentioned wharf was unoccupied, — *Held*, he could not recover demurrage in a court of admiralty, for the time lost by waiting, beyond what would have been lost if he had accepted the offer. *Robbins v. McDonald*, 140. .
2. Under the usual bill of lading, the lay days do not begin to run until the vessel has arrived at her place of discharge, and is ready to be unloaded. *Aylward v. Smith*, 192.
3. The proviso in a charter-party against liability for detention, unless "by default" of the charterer, exempts him only from delay from causes beyond his control acting directly to retard the discharging. *Thacher v. Boston Gas-Light Co.*, 361.
4. If part of a cargo is discharged at one wharf and part at another, the owners not objecting, the time necessary for moving the vessel is not chargeable to the charterers. 268 *Logs of Cedar*, 378.

See BILL OF LADING, 1; DAMAGES, 3; LIEN, 4.

DESERTION.

Seamen who are persistently ill-treated by their officers have a right to demand a discharge from their contract; and, if they leave the vessel, they are not deserters. *Coffin v. Weld*, 81.

DESPATCH.

See CHARTER-PARTY, 3.

DEVISE AND LEGACY.

See PARTNERSHIP, 7.

DURESS.

MASTER, 5.

DUTIES.

1. An importer who, for illegality, has forfeited his goods to the United States, loses the whole value of the goods in the home market; this, whether the goods are seized before or after entry. *United States v. 1,291 Bales of Tobacco*, 107.
2. The forfeiture is the same whether the importer has given a warehousing bond, or has paid the duties, or has neglected to enter the goods. *Id.*
3. When goods are seized in bond, the importer who wishes to have them released must stipulate for the value after the duties are paid, and not merely for their value in bond. *Id.*
4. The United States may have an action against a vessel for tonnage duties;

semble, they may have an action against the owner, and perhaps against the master. *The George T. Kemp*, 477.

5. Stat. March 3, 1820, § 2, which imposes a forfeiture of double the value of goods illegally imported, upon any one who knowingly receives them, is not confined to goods imported from territory adjoining the United States, nor to cases arising under statutes in operation when that section was enacted. *United States v. Jordan & al.*, 537.
6. The act of entering goods by a false invoice comes within the definition of an illegal "importation" under that section. *Ib.*

EMBEZZLEMENT.

See INDICTMENT, 1, 3.

EQUITY.

1. The courts of the United States have jurisdiction in equity to set aside a deed fraudulent as to creditors, though there may be concurrent jurisdiction at law, the remedy at law not being considered in all cases adequate and complete. *Pratt v. Curtis*, 87.
2. In equity, the court may give effect, upon equitable terms, to the valid part of a contract which is fraudulent in part. *Whiston v. Smith*, 101.
3. Equitable rights are not lost by the union or merger of different legal titles in one person. *Re Clap. — Ex parte Tarbell*, 168.
4. The general rule that in cases of contract for the sale of land equity does not consider time of the essence of the contract discussed. *Prentice v. Betteley*, 289.

See PARTNERSHIP, 6; PLEADING, 3.

ESTOPPEL.

One representing a vessel to be either foreign or domestic is estopped from setting up the contrary. *The George T. Kemp*, 477.

See BANKRUPT LAW: Acts of Bankruptcy, 4; Composition, 20; BILLS, NOTES, AND CHECKS, 6.

EVIDENCE.

1. The certificate of the consul, that the seaman was "duly" discharged, where the man was so ill as to be unable to continue the voyage, is of no value as evidence. *Callon v. Williams*, 1.
2. In this court the law of England may be proved by printed books of statutes, reports, and text-writers, as well as by the sworn testimony of experts. *The Pawashick*, 142.
3. Letters written by one partner to another concerning a lawsuit, which the partners expect to begin, and do presently after begin, are privileged. *Re Krueger, Loud, & Co. — Ex parte Bugbee*, 182.
4. So are letters which concern only the case of the party writing the letters, and have no relation to the title or position in the litigation of the interrogating party. *Ib.*
5. In the absence of fraud, a written contract between the master and owners

of a whaling-ship cannot be varied by parol evidence. *Slocum v. Swift*, 212.

6. In a libel for review by the defendant in a defaulted action, he may contradict the officer's return in that action. *Snow v. Edwards*, 273.
7. In a libel for forfeiture on account of false registry, if the papers, by means of which such registry is obtained, are identified, and come from the possession of government, it is not necessary to prove the signature to each paper. *The Mary Celeste*, 354.
8. Courts of admiralty may admit parol evidence that illiterate seamen signed a contract not read to them, which differed from their oral agreement; and may, in some cases, reform a written contract by oral testimony. *The Tarquin*, 358.
9. The testimony of the accused is not admissible in a case of extradition, though the magistrate, who is a judge of the United States, is sitting in a State where such evidence would be received. *Re Dugau*, 367.
10. That the consignees knew that a vessel was ready to receive cargo may be inferred from circumstances, so far as to throw the burden of proof on them to show the contrary. 268 *Logs of Cedar*, 378.

See BANKRUPT LAW: Proof of Debts, 32; Discharge, 17; PLEADING, 1, 2.

EXTRADITION.

1. A judge of the United States has authority to issue his warrant for the arrest of a supposed criminal, under the extradition treaty with Great Britain, and the statutes passed to aid in carrying that and similar treaties into effect, when due complaint is made to him, without a previous application having been made to the president. *Re Kelley*, 339.
2. In an extradition treaty the greater crime does not include the lesser. *Ib.*
3. Where there is an application for extradition, sustained by the complainant under oath, the judge has only to examine the evidence of criminality; and if he deems it sufficient to sustain the charge, to certify the same to the secretary of state. *Re Dugau*, 367.
4. The treaty of extradition with Great Britain does not give the accused the right to be confronted with the witnesses against him. *Ib.*

FACTOR.

See BANKRUPT LAW: Proof of Debts, 36; PRINCIPAL AND AGENT, 4.

FALSE SWEARING.

See PERJURY, 1, 2.

FEEES.

Under the fee bill of 1853, 10 Stats. 167, the supreme court has power to diminish but not to increase the fees therein mentioned. *Re Houghton*, 243.

See BANKRUPT LAW: Proof of Debts, 11; Priority, 1; Rights, Duties, &c., of Bankrupt, 6; Rights, Duties, &c., of Assignee, 20.

FINES, PENALTIES, AND FORFEITURES.

See DUTIES, 1, 2, 5; FORFEITURE.

FISHING VOYAGE.

1. Seamen engaged and serving for a fishing voyage have a lien on the fish for their wages. *Re Low. — Ex parte Baker*, 264.
2. The sharesmen in a cod-fishing voyage are not to suffer loss by the bad debts contracted by the owner in the sale of the fish. The account is to be made up as cash. *Crowell v. Knight*, 307.
3. A usage was proved to put on board only a part of the bait for a fishing voyage off the coast of Nova Scotia, the owners relying on catching suitable fish to supply the deficiency. *Held*, a reasonable usage; and, where the vessel, having failed to catch bait, put into port for a supply, causing a delay of a few days, — *Held*, that this would not authorize the seamen to refuse further duty. *The Tarquin*, 358.
4. Where the seamen refused duty before their fishing voyage was ended, and obliged the master to come home with only part of a fare, — *Held*, they had forfeited their wages. *Ib.*

FIXTURES.

See LANDLORD AND TENANT.

FOG.

As to rate of speed in a fog. *The Cambridge*, 21.

See COLLISION, 11.

FOREIGN LAW.

See EVIDENCE, 2.

FOREIGN VESSEL.

See LIEN, 11.

FORFEITURE.

1. Where absolute forfeiture to the United States is the statute penalty for an act, the title accrues when the penal act is committed. *The Mary Celeste*, 354.
2. If forfeiture is alternative, the title does not vest until the election is made, and an innocent purchaser before such election is protected. *Ib.*
3. Forfeiture, under Stat. 18 July, 1866, § 24, is absolute. *Ib.*

See DUTIES, 1, 2, 5.

FRAUD.

1. *It seems*, that to render a voluntary deed for the benefit of wife and children fraudulent as to creditors, it would be enough to prove that the grantor was in a doubtful position in respect to solvency. *Pratt v. Curtis*, 87.

2. The question of fraud in a mortgage of chattels, which permits the mortgagor to retain possession of the chattels, and act as apparent owner, is one of fact for a jury to decide. *Brett v. Carter*, 458.

See BANKRUPT LAW: Rights, Duties, &c., of Bankrupt, 5; Rights, Duties, &c., of Assignee, 1, 9, 14; Preferences; Discharge, 5, 15, 16, 18.

FRAUDS, STATUTE OF.

Leather was bought on a credit of sixty days, by parol, and the goods were weighed in the presence of the buyer, and the damaged hides rejected, and the shrinkage agreed on: they were then placed by themselves in the sellers' warehouse, marked with the buyer's name, and he was to send for them when he pleased. He made an arrangement with the sellers concerning the insurance of the goods. This course of dealing was usual between the parties. *Held*, the goods had been accepted and received by the buyer within the statute of frauds of Massachusetts. *Ex parte Safford*. — *Re Downing*, 563.

FREIGHT.

See AFFREIGHTMENT, 1, 2; BOTTOMRY, 5.

GARNISHEE.

See TRUSTEE PROCESS.

GENERAL AVERAGE.

1. If a deck-load, lawfully so carried by usage, be jettisoned, the ship and freight are liable to contribute for the loss in general average. *The William Gillum*, 154.
2. This contribution may be recovered by a libel against the vessel for a total loss. *Ib.*
3. Whether the shippers of goods under deck, who did not actually assent to the shipment, would be liable to contribute, *quære?*

GREAT BRITAIN.

Merchant Shipping Act, 1854. *The Magna Charta*, 136; *The Pawashick*, 142.

HARBOR-MASTER.

See COLLISION, 5.

HUSBAND AND WIFE.

A married woman who comes to Massachusetts without her husband, he never having lived with her in the State, has full power to contract as if she were sole, and may contract a debt having no connection with her separate estate or with her trade. Mass. Gen. St., ch. 108, § 29, construed. *Re Ruddell*, 124.

HYPOTHECATION.

See BOTTOMRY, 2.

IGNORANCE OF THE LAW.

See COLLISION, 1.

IMPORTATION.

See DUTIES, 6.

IMPORTER.

See DUTIES, 1, 2, 3.

IMPRISONMENT FOR DEBT.

1. The act of congress of March 2, 1867, 14 Stats. 543, adopts the modifications, conditions, and restrictions upon imprisonment for debt then existing by the laws of the several States, and the course of proceedings which may thereafter be adopted therein; and the United States, as plaintiffs in an action at common law, are not exempt from the provisions of that act by virtue of their prerogative. *United States v. Tellow*, 159.
2. The act of 1798, authorizing the secretary of the treasury to discharge poor imprisoned debtors of the United States, does not prevent the act of 1867 from being availed of by a debtor imprisoned at the suit of the government. *Ib.*

IMPRISONMENT OF SEAMEN.

Expenses, by whom borne. *Chester v. Benner*, 76.

INDICTMENT.

1. In an indictment under Stat. July 1, 1864, § 12 (13 Stats. 335), against a clerk in the post-office for secreting and embezzling a letter containing a bank-note, which describes the letter according to its direction, which is to some one other than the defendant, it is not necessary to allege that the letter or the note was the property of any one. *United States v. Laws*, 115.
2. If the letter was enclosed in an envelope, and the envelope was directed to A. B., the letter is well described as directed to A. B. *Ib.*
3. The indictment need not allege that the clerk obtained the letter by virtue of his employment: it is enough that, being a clerk, he has obtained possession of the letter. *Ib.*
4. It is not necessary to set out the places from and to which the letter was to be carried by post. *Ib.*
5. An indictment need not allege that the grand jury was duly organized, and that twelve concurred in the finding. *Ib.*
6. A defendant may take advantage of the bar of the statute of limitations, under the plea of not guilty. *United States v. Brown*, 267.

INSANE PERSON.

See BANKRUPT LAW : Acts of Bankruptcy, 7 ; Discharge, 2.

INSURANCE.

See BANKRUPT LAW : Proof of Debts, 7, 8 ; Preferences, 5.

INTEREST.

Where the respondents owed freight to the libellants, and were summoned as their garnishees in the State court, and, after some time, gave bond to the plaintiffs in the action in which they were summoned as garnishees, and thus dissolved the attachment, and afterwards the case in this court for the recovery of the freight was decided, — *Held*, that the respondents, not having tendered the freight, were bound to pay interest on the amount due, at the market rate of three per cent while the money was under attachment, and at the statute rate of six per cent after the attachment was dissolved. *Greenish v. Standard Sugar Refinery*, 553.

See DAMAGES, 6, 11, 13.

INTERNAL REVENUE.

A club or association of persons, not incorporated, combining together to promote social or literary objects, which delivers beer to its members, receiving checks in exchange for glasses of beer, having sold the checks originally to members of the club, is a dealer under the statute, and liable to be taxed, under section 18 of chapter 36 of the statute of 1875. *United States v. Wittig*, 466.

JETTISON.

See GENERAL AVERAGE, 1, 2, 3.

JUDGMENT.

See BANKRUPT LAW : Rights, Duties, &c., of Assignee, 9 ; Proof of Debts, 4 ; Discharge, 1 ; PRACTICE, 4, 19.

JURISDICTION.

1. A decree of a State court enjoining a corporation from further prosecuting its business on the ground of insolvency, and appointing receivers, does not oust the jurisdiction of the district court to adjudge the corporation bankrupt. *Re The Independent Insurance Co.*, 97.
2. The district court has full jurisdiction of all contracts of affreightment and of claims for indirect as well as direct damages for the violation of them. *The A. M. Bliss*, 103.
3. A British shipmaster may proceed in this court for his wages against the British ship in which he served. *The Pawashick*, 142.
4. The court will take jurisdiction of such a suit between foreigners, if the

- voyage is ended, and there is no contract binding the parties to another jurisdiction, and no reason given why justice cannot be done here. *Ib.*
5. The admiralty has jurisdiction of a personal action by a charterer against the owner of a vessel for damages, in not proceeding to the port of loading. The jurisdiction does not depend upon the fact of the cargo, or some part of it, having been put on board the vessel. *Oakes v. Richardson*, 173.
 6. A contract, whether absolute or contingent, for services in saving property on the sea or harbor, does not oust the jurisdiction of this court of a proceeding, *in rem* or *in personam*, brought by the contractor himself. *The Louisa Jane*, 295.
 7. Where the possession of movable property has been changed, against the right of the true owner, by a maritime tort, or by the breach of a maritime contract, to which the property was subject, the owner may vindicate his title in a court of admiralty by a proceeding *in rem*. 528 *Pieces of Mahogany*, 323.
 8. The allegation in a creditor's petition for adjudication in bankruptcy, that the petitioners constitute the requisite amount and number of all his creditors, is not the allegation of a jurisdictional fact. *Ex parte Jewett*. — *Re Morris*, 393.
 9. *Seem*, if services or a contract properly concern a vessel and her owners, they are maritime services, and can be sued against the owners of a domestic vessel in a court of admiralty, or *in rem* against a foreign vessel. *The George T. Kemp*, 477.

.See EQUITY, 1; SALVAGE, 2, 3.

LANDLORD AND TENANT.

1. A tenant, who substitutes some fixtures for others, still serviceable, belonging to the landlord, cannot remove them at the expiration of the lease, without accounting to the landlord for those which he removed. *Ex parte Hemenway*. — *Re Stevens*, 496.
2. The right of the tenant to remove fixtures is not lost by non-payment of rent and notice to quit. If the landlord has prevented the removal by an attachment of the fixtures, the right is not lost even by leaving the premises. *Ib.*
3. A parol renewal of a lease renews whatever rights the tenant had to remove the fixtures. *Ib.*

See BANKRUPT LAW: Rights, Duties, &c., of Assignee, 16; Proof of Debts, 35.

LAY DAYS.

See DEMURRAGE, 2.

LEX FORI.

See *Ex parte Heidelberg*. — *Re Glyn*, 526.

"LIABLE."

Meaning in statute. *The Mary Celeste*, 354.

LIBEL.

A libel in admiralty will not be dismissed merely because it was brought too soon, if substantial justice can be done, and ought to be done, under it. *The Hyperion's Cargo*, 93.

See PLEADING, 1, 2.

LIEN.

1. One who advances money in good faith, to enable the master of a foreign vessel arriving here to pay the custom-house charges and the wages of his crew, has a privilege against the vessel for these advances. *The Tangier*, 7.
2. To create a privilege on the ship, it is enough that the advances are necessary to free her from debts previously due, which are a charge on the ship. *Ib.*
3. If the person making the advances were not himself a material-man, he might yet have a privilege by subrogation to the rights of the seamen and others whose claims he has paid. *Ib.*
4. By the maritime law a master has a lien upon the cargo for demurrage, and such a lien may be enforced in the admiralty, although demurrage was not expressly stipulated for in the bill of lading. *The Hyperion's Cargo*, 93.
5. There is no lien upon a vessel for loans made on a pledge of the freight as security. *The A. M. Bliss*, 103.
6. *It seems*, that where there is a lawful contract of affreightment, there is a lien on the vessel as security for its performance, though no part of the cargo has been shipped under it. *Oakes v. Richardson*, 178.
7. Where the master of a vessel engaged in the coasting trade agreed with the owner for sixty dollars a month as wages for himself and for his minor son, who acted as cook, and it was understood that two-thirds of this sum were for the master's services and one-third for those of his son, and the owner died insolvent, — *Held*, the contract was severable, and there was a lien on the vessel for wages due the son. *The Benjamin English*, 218.
8. A person who advances his own money for the fees in bankruptcy has a first lien on the assets for its repayment. A mortgage to secure the advance gives no additional security, and is useless. *Whiston v. Smith*, 101.
9. Seamen engaged and serving for a fishing voyage have a lien on the fish for their wages. *Re Low. — Ex parte Baker*, 264.
10. All liens are preserved which are not expressly disposed of by the bankrupt act. *Re Clapp & Co.*, 468.
11. A ship whose legal owner is foreign, and whose flag is foreign, is a foreign ship, so far as material-men are concerned, though the equitable owner lives in Massachusetts, and a material-man in Boston has a lien on such a ship without recording his claim, such a ship not being within the statute of Massachusetts. *The George T. Kemp*, 477.
12. A stevedore has a lien upon a foreign vessel for his services rendered at the request of the master in a case in which the vessel is to stow the cargo. *Ib.*

13. One who obtains the first decree in admiralty has no priority over those whose liens are in themselves of equal degree with his. *The Fanny*, 508.
14. If there has been a break, such as a voyage, between the times of supplying the vessel, those who supplied the last voyage have precedence over those who furnished an earlier outfit. *Ib.*
15. Jersey City is foreign to the city of New York, in the sense of the law governing supplies to ships and the lien therefor. *The Sarah J. Weed*, 555.

See **BANKRUPT LAW**: Rights, Duties, &c., of Assignee, 9, 16; Proof of Debts, 2.

16. If the note of an agent of a ship is taken by material-men, that does not affect their lien, unless so intended by both parties. *Ib.*
17. The lien of material-men is assignable; and the assignee should proceed in the admiralty in his own name, if the assignment is absolute. *Ib.*
18. Supplies furnished in Maine by a material-man in New York to a vessel belonging in New York, are foreign supplies, and give rise to a privilege. *Ib.*

LIGHTS.

Signal lights required by statute to prevent collisions. *The Ontario*.—*The Helen Mar*, 40.

See **COLLISION**, 7.

LIMITATIONS, STATUTE OF.

1. A mate of a whaling vessel was indicted for beating and wounding one of the crew, more than two years before the date of the indictment. *Held*, the prosecution was barred by the statute of limitations of 30th April, 1790, 1 Stats. 119, notwithstanding the defendant had been absent from the United States during the whole of the two years after the offence was committed. *United States v. Brown*, 267.
2. The statute of 28th February, 1839, §§ 4, 5, Stats. 322, extending the time for suits and prosecutions for penalties to five years, does not apply to indictments for crimes which may be punished by imprisonment. *Ib.*
3. Whether it applies to any criminal prosecutions, *quære?* *Ib.*
4. In a trial upon an indictment, the defendant may take advantage of the bar of the statute of limitations, under the plea of not guilty. *Ib.*

LIQUIDATED DAMAGES.

See **DAMAGES**, 10.

MARRIED WOMEN.

See **HUSBAND AND WIFE**.

MARSHALLING OF ASSETS.

See **BANKRUPT LAW**: Proof of Debts, 12, 14, 22, 23; **PARTNERSHIP**, 4, 6, 8, 9, 16.

MASTER.

1. Whether a master in a foreign port can lawfully bind himself to consign the vessel to any particular person in case of disaster, *quære?* *Mauran v. Warren*, 53.
2. A master of a whaling ship was allowed a commission for selling oil after the voyage was ended, — was not allowed extra pay as cooper, when the ship's cooper was ill. *Slocum v. Swift*, 212.
3. Commissions paid the master on the ship's bills disallowed unless he has paid them over to the owners. *The Eureka*, 417.
4. The master of a ship must take delivery of goods in such manner as the shipper makes it, or reject them altogether. *The M. K. Rawley*, 447.
5. Where a master made his bill of lading to the order of the shipper, and the shipper, by his possession of the bill, induced the owners and consignees of the goods to accept and pay a draft, *quære*, whether this acceptance and payment were made under compulsion, and whether the amount of the draft could be recovered of the master, even if he were not justified in signing a bill of lading in that form. *Ib.*
6. *Semble*, the United States may have an action against the master for tonnage duties. *The George T. Kemp*, 477.

See JURISDICTION, 3; LIEN, 4; WHALING VOYAGE, 4.

MATERIAL-MEN.

See LIEN, 11, 16-18.

MINORS.

Enlistment of minors in the marine corps. *Re McNulty. — Re Clement*, 270.

MORTGAGE.

1. A mortgage given to a surety to indemnify him for undertaking to secure debts of a mortgagor, who afterwards became bankrupt, is a trust for the benefit of the creditors to whom the surety became bound. *Re Pierce. — Ex parte White*, 343.
2. Where such a mortgage is assigned to a purchaser, with notice of the trust, he takes the property upon the same trusts. *Ib.*
3. Where the money paid by such a purchaser is, in fact, applied to the payment of the debts which the mortgage was given to secure, the purchaser may have the benefit of such application. *Ib.*
4. But if the purchaser is himself a creditor under the mortgage, he has no priority over the other creditors. *Ib.*
5. A mortgage of future additions to a stock of goods in a particular shop is a valid mortgage of such goods, as fast as they are put into the shop by the mortgagor. *Brett v. Carter*, 458.

See BANKRUPT LAW: Rights, Duties, &c., of Assignee, 16; Preferences, 3; FRAUD, 2; PLEDGE, 1; SUBROGATION IN ADMIRALTY, 2.

NECESSARIES.

See BANKRUPT LAW: Rights, Duties, &c., of Assignee, 15.

NOTICE.

See PARTNERSHIP, 2, 8.

OFFICER'S RETURN.

See EVIDENCE, 6.

OWNERS.

1. Where the master sent the clothes of a seaman, who was left in hospital at a foreign port, to the consul's office, and the evidence did not show that the seaman received them, — *Held*, he could recover their value of the ship-owner. *Callon v. Williams*, 1.
2. The majority in number and value of the owners of a vessel may bring a libel in admiralty in the name of all, subject to the rights of the others to be indemnified for costs. *Richmond v. New Bedford Copper Co.*, 315.
3. *It seems*, that part owners of a ship cannot release a debt due to all the owners, if the debtor knows that the debt is due to all the owners as such. *Ib.*
4. By the general maritime law, the presence of the owner does not preclude giving credit to the vessel. *The George T. Kemp*, 477.
5. It is a question of fact whether credit is given to a vessel or her owners; the equitable ownership does not always determine the question of credit. *Ib.*
6. *Semble*, the United States may have an action against the owner for tonnage duties. *Ib.*

See BOTTOMRY, 1; JURISDICTION, 9; SUBROGATION IN ADMIRALTY, 2; WHALING VOYAGE, 5, 6.

PARTIES.

1. *It seems*, that at law, one of two joint contractors has the right to sue in the name of both, subject to the right of the other to be indemnified for costs, and to give a release of the joint cause of action. *Richmond v. The New Bedford Copper Co.*, 315.
2. Where ten out of thirteen owners, having a majority of the shares in a ship, brought a libel in admiralty in the name of all, a motion by the three unwilling plaintiffs to have their names struck out of the libel was denied, with leave to apply to have the suit stayed until they were indemnified for costs. *Ib.*
3. The lien of material-men is assignable; and the assignee should proceed in the admiralty in his own name, if the assignment is absolute. *The Sarah J. Weed*, 555.

See BANKRUPT LAW: Rights, Duties, &c., of Bankrupt, 9.

PARTNERSHIP.

1. One who permits his name to be used in a firm from which he has retired is liable to a person who has bought a note of the new firm, without notice or knowledge of the change. *Re Krueger*, 66.
2. In such case constructive notice is not sufficient. *Ib.*
3. One who permits himself to be held out as a partner may be made bankrupt as a member of the firm at the suit of creditors. *Ib.*
4. Where there has been a conveyance of the joint assets of an insolvent firm to a continuing partner, whether joint creditors can share equally with separate creditors in the separate property of the continuing partner, if there is no joint estate and no solvent partner, *quære?* *Re Johnson & Stowers*, 129.
5. *It seems*, that joint creditors may assent, after petition in bankruptcy, to such conveyance, and come in with separate creditors to prove their debts against the separate estate of the continuing partner, if he has assumed the joint debts. *Ib.*
6. Upon the death of one member of a firm, the survivor is bound in equity to apply the joint estate to the payment of the joint debts; and the representatives of the deceased partner, and, in case of bankruptcy, the creditors of the firm, may enforce this equity. *Re Clap. — Ex parte Tarbell*, 168.
7. A partner, by his will, made his brother, who was his copartner, executor, and devised to him the residue of his estate in trust for certain purposes, and authorized him to use in his business the property given him in trust, until it should be wanted for distribution. *Held*, that the intent of the will was, that the residue only should be used in business, and that the surviving partner was bound to settle the affairs and pay the debts of the firm in the usual way, notwithstanding this clause. *Ib.*
8. The surviving partner carried on the business as before, and notified creditors and others dealing with him that his brother's capital remained in the business; he paid the greater part of the joint debts, and contracted new debts; he converted a part of the joint property into money, but less in value than the sum of the joint debts, and became bankrupt, having in his possession bank stock and other specific assets, standing in the name of the firm, without change, since the death of his brother, — *Held*, that a joint creditor of the old firm, who had not received the notice above mentioned, could require that joint property remaining *in specie*, as it stood at the death of the deceased partner, should be applied to the payment of his debt in exclusion of the separate creditors of the bankrupt.
It seems, if the creditor had received the notice, it would not have affected his lien, unless he had done something amounting to an election. *Ib.*
9. The fact that the surviving partner was executor and trustee of the deceased partner does not affect the rights of joint creditors; and, when bankruptcy occurs, the creditors may assert the lien, which, while the surviving partner is solvent, is vested in the executor of the deceased partner. *Ib.*
10. The mere exchange of the note of a firm, dissolved by the death of one partner, for a note similar in all respects to the surrendered note, signed with the firm's name, by the surviving partner, does not convert the joint debt into a separate debt of the surviving partner, unless it appears that

such conversion was intended by the holder of the note. *Re Clap. — Ex parte Smith*, 226.

11. A joint and several note, signed by the three partners of H. & Co., in their individual names, and by A., B., and C., as sureties, is the joint note of all, and the several note of each of the signers, but not the joint note of the firm of H. & Co. *Re Holbrook. — Ex parte Windham Prov. Inst.*, 259.
12. Proof between joint and separate estates of copartners in bankruptcy. *Re Lane, Brett, & Co. — Re Boynton*, 333; *Re Buckhause*, 331.
13. The bankruptcy of one partner, *ipso facto*, dissolves the partnership, and a court of equity may give either the solvent partners or the assignee the settlement of the joint affairs. *Wilkins v. Davis*, 511.
14. The assignee may recover at law or in equity, as the nature of the case requires, from a solvent partner what is due from him by the articles of copartnership. *Ib.*
15. Where a special partnership was formed under the statutes of Massachusetts, and the general partner became bankrupt, with assets insufficient to pay the joint debts, — *Held*, that his assignee could recover from the solvent special partner the sums withdrawn by him during the continuance of the firm. *Ib.*
16. A creditor of a firm of which a member has become bankrupt cannot compete with the separate creditors in the distribution of separate assets, but will receive dividends from any joint assets which the assignee may obtain, and from any surplus of the separate assets after the separate debts are paid. *Ib.*

See BANKRUPT LAW: Acts of Bankruptcy, 5, 8, 9, 10, 13; Proof of Debts, 14, 15, 16, 23, 24; Preferences, 4; Discharge, 18, 19, 20, 21, 22, 23.

PAYMENT.

1. Where the master of a vessel in the coasting trade has agreed with the owner for a certain sum a month as wages for himself and minor son, who acted as cook, two thirds for his services and one third for his son's, and the owner of the ship had died insolvent, and the master had received earnings of the vessel, but not enough to pay all the wages, — *Held*, the net earnings so received were to be appropriated to the master's and cook's wages, *pro rata*. *The Benjamin English*, 218.
2. Where the sharesmen in a cod-fishing voyage gave an order on the owners to pay their shares to A., and A. ordered payment to be made to B., which was done, and B. afterwards failed, — *Held*, the payment discharged the owners, though the order was not negotiable. *Crowell v. Knight*, 307.

See BANKRUPT LAW: Proof of Debts, 38; BILLS, NOTES, AND CHECKS, 5; MASTER, 5; PARTNERSHIP, 10.

PERJURY.

1. False swearing, under Stat. 1st March, § 3, 3 Stats. 771, is committed by knowingly swearing falsely to any material fact, though that fact be only the witness's belief of a material fact. But it is not committed by rash or reckless swearing. *United States v. Moore*, 232.

2. A defendant made affidavit that a certain treasury note, of which he produced a fragment, had been nearly all destroyed on a certain day, which was not true in fact. There was some evidence from which the jury might have inferred that the defendant, though rashly, believed the fact to be as he stated it. The indictment charged that the defendant made the statement knowing it to be false. *Held*, the jury should be asked to find whether the defendant made the statement knowing it to be false; and that a further instruction, that the offence would be made out by showing that he swore to personal knowledge of the fact, when he knew he had no such knowledge, was erroneous, because there was no evidence that he had sworn to such knowledge. *Ib.*
3. An affidavit to the existence of a fact does not import that the affiant has personal knowledge thereof, unless so stated, or the fact be of such a character that he must have personal knowledge, and whether a written affidavit contains such a statement, is a question of law. *Ib.*

PILOT.

1. A vessel that is within pilotage ground, but disabled so that she cannot get into port without steam, is not bound to accept the offer of a pilot, or pay his fee. *Flanders v. Tripp*, 15.
2. A pilot is not bound to take charge of a disabled vessel for the usual pilot's fee. *Ib.*

PLEADING.

1. In the admiralty practice of this country there is no rigid rule that a libellant in a collision cause, alleging one fault on the part of the defendant vessel, cannot recover on proof of a different fault. *The Cambridge*, 21.
2. Where the libel alleged only that the defendant steamer ported when she should have starboarded, and the evidence for the steamer proved that she was running at too great speed in a fog, and had no look-out forward, — *Held*, the libellant could rely on these faults as well as on those which he had alleged. *Ib.*
3. A bill in equity by an assignee in bankruptcy, which charged that a debtor made a conveyance for the benefit of his wife and children at a time when he was much embarrassed, and that some of the creditors, at the date of the deed, were still creditors at the date of the bankruptcy, was *held* good on demurrer, though it did not charge that the debtor was insolvent when he made the deed. *Pratt v. Curtis*, 87.
4. If a subsequent purchaser of land, said to have been fraudulently conveyed, is made defendant to a bill to set aside the conveyance, he should be charged to have had knowledge of the fraud when he purchased the land. *Ib.*

See BANKRUPT LAW: Rights, &c., of Assignee, 2; GENERAL AVERAGE, 2.

PLEDGE.

1. By the law of Massachusetts, a bill of sale intended for security operates as a pledge and not as a mortgage, and does not require, or admit of, recording. *Ex parte Fitz. — Re Rawson*, 519.

2. Delivery to the pledgee may be either actual or constructive, and possession may be kept by an agent, and that agent may be the pledgor. *Ib.*

POOR DEBTORS.

See IMPRISONMENT FOR DEBT.

POST-OFFICE.

See INDICTMENT, 1, 2, 3, 4.

PRACTICE.

1. The district court, sitting in bankruptcy, has the power to recall a final decree, granting a discharge to a bankrupt, upon application made during the term of court at which the decree was passed. *Re Dupee*, 18.
2. *It seems*, that the court has the power to do this after the term has passed. *Ib.*
3. This power will be exercised in a case in which counsel opposing the discharge was prevented by a sudden and overpowering accident from being present at the hearing, if it should be made to appear that the opposing creditors were in fact prevented by the accident from presenting their case, and they believed they had a good case upon the merits, showing actual fraud in the bankrupt. *Ib.*
4. Where a creditor of a bankrupt prosecutes a suit merely for the purpose of ascertaining the amount due, he should cause that fact to appear of record, and the judgment should be modified to correspond with the fact. *Re Gallison*, 72.
5. Where such a creditor proved his debt, and afterwards obtained an unconditional judgment, and took out execution, and appeared to oppose the discharge, no one having moved to expunge his proof, — *Held*, he would be heard against the discharge on filing a stipulation to cancel his judgment if the discharge should be granted. *Ib.*
6. It is not illegal to hold a court of the United States on a day appointed by the president of the United States, and by the governor of Massachusetts, as a day of thanksgiving. *Re McGlynn*, 127.
7. The process and forms of proceeding adopted by congress from the State laws, are binding on the United States. *United States v. Tellow*, 159.
8. The first meeting of creditors in a proceeding in bankruptcy should be kept open for at least one hour. *Re Gilley*, 250.
9. Where such meeting was warned for ten o'clock, and certain creditors appeared and voted for assignees, and the register declared the polls closed at half-past ten, and other creditors appeared and voted before eleven o'clock, — *Held*, the register should have counted these last votes. *Ib.*
10. Courts of admiralty have power to vary their own decrees. In the American practice, a summary rehearing, on motion, can be granted only during the term at which the decree was made. *Snow v. Edwards*, 273.
11. In defaulted actions, the summary jurisdiction to rehear is limited to ten days, irrespective of terms of court, by admiralty rule 40 of the Supreme Court. *Ib.*

12. After the term has passed in ordinary cases, and after ten days in defaulted cases, the court can entertain a libel of review. *Ib.*
13. The Statute of March 2, 1867, 14 Stats. 453, makes arrests for debt depend upon the laws for similar arrests in the States respectively, and applies to admiralty proceedings. *Louisiana Ins. Co. v. Nickerson*, 810.
14. This court will not order a defendant to give a stipulation to the action, under pain of imprisonment, in a case in which he is not liable to arrest. *Ib.*
15. By a rule of this court, passed in 1855, a warrant to attach the goods and chattels, or, in default thereof, the credits of the defendant, may be granted in cases in which an arrest cannot legally be made, and it is within the power of the court to make such a rule. *Ib.*
16. Courts of admiralty, within the limits of their jurisdiction, resemble courts of equity in their practice and modes of proceeding. *Richmond v. The New Bedford Copper Co.*, 315.
17. A party who would be the defendant in ordinary cases may often assume the character of libellant in a court of admiralty, in order to bring his case before the court, if the opposite party is in possession of the *res*, or of a fund in which the libellant has a right to share. 528 *Pieces of Mahogany*, 323.
18. In this district, if there is a stay of proceedings against one of several joint defendants, pending action upon his discharge in bankruptcy, the case cannot proceed against his co-defendants, unless the plaintiff chooses to discontinue as to him. *Hinman v. Cutler*, 364.
19. A qualified judgment cannot be entered against one of several joint defendants, which leaves the liability of his co-defendants undetermined. *Ib.*
20. An allegation in a creditor's petition for adjudication in bankruptcy, that the petitioners constitute the requisite amount and number, may be amended after a meeting for composition has been held, and when the question of the acceptance of the resolution is before the court. *Ex parte Jewett*. — *Re Morris*, 393.
21. A case is pending in bankruptcy so that a composition may be proposed and made, though the verification of the petition is defective. *Ib.*
22. In the absence of fraud, a defect in the verification of the creditor's petition is waived by the debtor, when he calls a meeting for composition; and the dissenting creditors cannot take advantage of it. *Ib.*
23. In bankruptcy, the time for opening a meeting or hearing is to continue one hour from the time fixed in the order, and if the magistrate does not appear, or has not been heard from within the hour, any party may have the meeting continued. *Re Ewing*, 407.
24. Libels or petitions against a vessel are heard by a court of admiralty in any order in which they are brought up, but the proceeds are not distributed until all libels and petitions have been heard, except to those who have an undoubted priority, such as seamen and salvors; and this not without notice to all others. *The Fanny*, 508.
25. The courts of the United States are not bound by the decisions of State courts on questions of general jurisprudence. *Ex parte Heidelberg*. — *Re Glyn*, 526.
26. The question whether an examination of a bankrupt is so far completed as to be admissible in evidence is not one which can properly be certified to

the court for decision by the register taking the examination. *Re Noyes*, 352.

27. The note of a third person, given as security for supplies to a ship, must be produced in court when a decree for the price is made against the ship, and the amount realized from the decree must be indorsed on the note. *The Sarah J. Weed*, 555.
- See BANKRUPT LAW: Acts of Bankruptcy, 12; Discharge, 3, 4, 5, 7, 8, 9; Composition, 3, 4, 5, 6, 8, 17, 18; Preferences, 9; PARTIES, 1, 2; PLEADING, 1, 2.

PREROGATIVE.

That of the United States considered. *United States v. Tellow*, 159.

PRINCIPAL AND AGENT.

1. Where an agent, in accordance with a usage of business, receives back from the average adjuster a part of the amount charged for his services, he must credit his principal with the amount of such discount or drawback. An agent cannot receive payment from both sides. *Mauran v. Warren*, 53.
2. Where agents of a vessel, who were part owners, chartered the vessel to a creditor of their own, to enable him to repay himself out of the earnings, — *Held*, the charter-party was void as against the vessel and the other owners. *The A. M. Bliss*, 103.
3. The treasurer of a manufacturing company, who signs and indorses promissory notes for the company in the usual course of business, does not by such usage acquire, nor is he held out as having, the right to sign or indorse notes for the accommodation of third persons. *Re The Wrentham Manuf. Co. — Ex parte Southwick*, 119.
4. The principal of a bankrupt factor may recover from the assignee any goods remaining unsold, or any proceeds of sale which can be specifically identified. *Nutter v. Wheeler*, 346.
5. A consignee, by the terms of his agency, may be the agent of the consignor until the consigned goods are sold; and, when they are sold, become, as between him and the consignor, the purchaser of and principal debtor for the goods sold. *Ib.*
6. Supplies furnished in Maine to a vessel belonging in New York, by an agent of the vessel in New York, give the agent a lien therefor. *The Sarah J. Weed*, 555.
7. The general agent of a ship at her home port is not entitled to be subrogated to the lien of the seamen whose wages he has paid in the regular course of his agency. *Ib.*

See BANKRUPT LAW: Proof of Debts, 31; BOTTOMRY, 3, 4.

PRIORITY.

See BANKRUPT LAW: Priority; LIEN, 14; PRACTICE, 24.

PRIVILEGE.

See JURISDICTION, 3; LIEN, 1.

PRIVILEGED COMMUNICATIONS.

Between bankrupt and his counsel. *Re Krueger, Loud, & Co. — Ex parte Bugbee*, 182.

See BANKRUPT LAW: Rights, Duties, &c., of Bankrupt, 3, 4; EVIDENCE, 3, 4.

PROFITS.

See DAMAGES, 5, 8.

RATIFICATION.

See SALE, 3.

REGISTRY.

See FORFEITURE.

RELEASE.

See OWNERS, 3; PARTIES, 1.

RENT.

See BANKRUPT LAW: Rights, Duties, &c., of Assignee, 16; Proof of Debts, 35.

REPEAL.

See *United States v. Jordan*, 537.

REPUDIATION.

See BANKRUPT LAW: Rights, Duties, &c., of Assignee, 5.

RETROSPECTIVE STATUTE.

See *Re Griffiths*, 340.

REVIEW.

See PRACTICE, 12.

RULES OF COURT.

See BANKRUPT LAW: Rights, Duties, &c., of Assignee, 12; PRACTICE, 15.

SALE.

1. A., the owner of certain goods, deposited them with a warehouseman in the name of B., who was A.'s broker, and afterwards sold them to B., gave him a receipted bill of parcels, and took his note for the price. *Held*, that no further delivery of the goods was necessary, and that A.'s lien as vendor was lost. *Re Batchelder. — Ex parte Luce*, 245.
2. Another parcel of goods was warehoused in the name of C., another broker, and was sold by A., the owner, to B., and a receipted bill given, and a negotiable promissory note taken for the price, which note was signed by B., and indorsed by D. for B.'s accommodation. B. and D. failed before the note became due. Notice of the sale had been given to C., but not to the warehouseman. *Held*, 1, The possession was not changed, and the

- lien of A. revived on the failure of B. and D. 2, As affecting the lien it was immaterial whether the note was taken as payment or security. *Ib.*
8. A., doing business in Worcester, Mass., made a contract with B.'s agent in New York (B. living in Philadelphia) to buy a large quantity of iron, deliverable in monthly instalments, on credit. The contract was subject to B.'s ratification. A., a day or two afterwards, called on B., who told him he had received the order and entered it on his books. The parties afterwards corresponded about the contract, as subsisting. *Held*, there was sufficient evidence of ratification. *Re Wheeler*. — *Ex parte Carter*, 252.
 4. By the law of Massachusetts, a bill of sale intended for security operates as a pledge and not as a mortgage, and does not require, or admit of, recording. *Ex parte Fitz*. — *Re Rawson*, 519.

See PLEDGE, 2; STATUTE OF FRAUDS.

SALVAGE.

1. A salvage service is performed when a raft of timber is saved from peril on navigable waters. *Fifty Thousand Feet of Timber*, 64.
2. A claim for such salvage service may be maintained in a court of admiralty, if there is no local custom making the service gratuitous. *Ib.*
3. If the owners of a vessel which has performed a salvage service make a settlement with the owners of the property saved, and receive the salvage, the crew may recover from them a due share of the reward by libel in admiralty. *Studley v. Baker*, 205.
4. Where a coasting schooner rendered such a service to a frigate, and a sum of money was paid by the United States to the owners of the schooner, who signed a receipt for owners, master, and crew, — *Held*, the crew were entitled to a share, although the owners testified that they did not consider the services of the crew in making the settlement. *Ib.*
5. Where the principal service had been performed by the vessel acting as lighter, and the actual work of lightering had been done by men from the vessel in distress, the owners and master of the lighter were allowed three-fourths of the salvage, and the crew one-fourth. *Ib.*
6. Persons who assist a vessel in distress at the request of her master or owner, with no definite arrangement for compensation, must ordinarily be paid as salvors. *The Louisa Jane*, 295.
7. If the rate of payment is established by the usage of a port well-known to both parties, the payment for salvage services may be affected or controlled by such usage. *Ib.*
8. The distinction between absolute and contingent contracts for salvage services is of no practical importance. *Ib.*
9. A steamship, worth, with her cargo, \$500,000, took the ground in the harbor of Boston, and was pulled off, at about high water, by a large tug, assisted by the engines of the steamship, and by two small tugs, the principal power being furnished by the ship and the large tug, and the small tugs being occupied less than an hour. *Held*, the small tugs had rendered a salvage service and should be paid a liberal compensation. *Baker v. Hemenway*, 601.

10. In the forgoing case \$800 and \$400 decreed. *Ib.*
11. A steamship lost her anchor, at night, in a roadstead within the limits of the harbor of Boston, and a wrecker, knowing the ownership of the vessel, and that the owners were ready to contract for the recovery of the anchor, went in search of it, succeeded in finding but was unable to raise it, when another wrecker, employed by the owners, came to the spot, and offered him twenty-five dollars for what he had done; and when that offer was rejected, offered the use of a steam winch for raising the anchor which was likewise refused. The first wrecker expended money and time in recovering the anchor, and refused a tender of fifty dollars, — *Held*, that he should have twenty-five dollars, without costs. *One Anchor and Chain*, 549.
12. A seaman cannot have salvage for the boat which has brought him to land after the wreck of his ship. *Price v. Sears*, 553.
See DAMAGES, 7; JURISDICTION, 6.

SEAMEN.

1. Where a second mate was called on by the mate to help in suppressing a serious riot on board a ship lying at the wharf in a foreign port, and took a loaded pistol, which the mate warned him not to use, and in the scuffle the pistol was accidentally discharged and wounded the second mate himself, — *Held*, he was wounded in the service of the ship. *Callon v. Williams*, 1.
2. A consul at a foreign port has no power to discharge a seaman for disability arising from wounds contracted in the service of the ship. *Ib.*
3. A seaman so situated has a right to be cured and sent home at the expense of the ship, and his wages continue to the time of his return, not exceeding the length of the voyage. *Ib.*
4. The statutes authorizing consuls to discharge seamen with their own consent do not apply to men who are so ill as to be unable to continue the voyage. *Ib.*
5. Where seamen were imprisoned in a foreign jail by order of the American consul at that port and there was no evidence of bad faith on the part of the master, — *Held*, the men must pay the necessary charges of the imprisonment and the expense of hiring substitutes. But the consul's own charges, as judge, are to be paid by the ship. *Chester v. Benner*, 76.
6. Seamen who are persistently ill-treated by their officers have the right to demand a discharge from their contract; and if they leave the vessel, they are not deserters. *Coffin v. Weld*, 81.
7. Stat. 1840, clause 17, § 5 Stats. 396, construed to apply to seamen subjected to unusual or cruel treatment, though they have not deserted on that account. *Ib.*
8. Taking into consideration the other acts *in pari materia*, and especially the statute of 1856, § 26, one-third of the three months' pay mentioned in clause 17 of the act of 1840 is to go to the United States. *Ib.*
9. Where it appeared that the crew justly complained of cruel conduct on the part of the mate, and the consul at a foreign port effected a compromise, by which the master was to discharge the mate and the crew were to navigate the ship to the next port; and the crew went on board the ship again,

- but afterwards refused duty, upon a suspicion, which appeared not wholly unfounded, that the mate had not been discharged, and the consul then discharged them for disobedience, — *Held*, they might recover two months' wages; because they were entitled to their discharge, and the consul had never adjudged that they were not. *Ib*.
10. The rights of seamen in respect to wages depend on the law of the flag, without regard to the nationality of the seamen themselves. *The Magna Charta*, 136.
 11. It appears to be the law of Great Britain, that when a seaman is hurt in the service of the ship, and left behind for that cause in a foreign port, and the cause is duly certified by the consul, the ship is responsible for his care and subsistence, but the wages stop. *Ib*.
 12. Where such a seaman was so left behind, and the ship afterwards, on the same voyage, came back to the port and took the seaman on board again, and he served to the port of final discharge, and no new contract in writing was made with him, — *Held*, the presumption was that he was to have the rate of wages originally agreed on, though the market rate was lower at the foreign port. But it would not be presumed that the seaman was to have wages for the whole voyage, including the time he was away from the ship. *Ib*.
 13. So far as the wages only are concerned, it seems to be immaterial by the British law, whether a seaman necessarily left behind at a foreign port for injuries received on board, was hurt in the service of the ship, or by his own fault. In either case the wages stop. *Ib*.
 14. The forfeiture of wages for absence without leave is left largely to the discretion of the court; and where such absence was not fully justified, but had caused no pecuniary loss to the master, a small deduction from the wages was made. *Scott v. Rose*, 381.
- See FISHING VOYAGE; OWNERS, 1; SHIPPING ARTICLES, 2; WHALING VOYAGE, 2.

SET-OFF.

See BANKRUPT LAW: Set-off.

SHIPPING ARTICLES.

1. The stipulation in shipping articles for whaling voyages, that the owners shall have the right to ship catchings home on freight, is beneficial to both parties, and is valid. *Frates v. Howland*, 36.
2. A clause in the shipping articles by which the crew agree to pay charges of imprisonment does not bind them to pay the fees of the consul acting as judge. *Chester v. Benner*, 76.

See EVIDENCE, 8; WHALING VOYAGE, 1.

STARE DECISIS.

The district court, in a case not large enough to be appealed, is bound to follow the decision of the circuit court on the same matter, though doubting its correctness. *Chester v. Benner*, 76.

See *The George T. Kemp*, 477, 482.

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See PRACTICE, 18.

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SUBROGATION IN THE ADMIRALTY.

1. A person who pays the wages may be subrogated to the rank of the seamen.
The J. A. Brown, 464.
2. A part owner may have such subrogation as against the mortgagee of the share of another part owner. *Ib.*
3. The general agent of a ship at her home port is not entitled to be subrogated

to the lien of seamen whose wages he has paid in the regular course of his agency. *The Sarah J. Weed*, 555.

See BANKRUPT LAW: Rights, Duties, &c., of Assignee, 7; *The Tangier*, 7.

SUPPLIES.

See LIEN, 15, 18; PRACTICE, 27.

SURETY.

1. A mortgage given to a surety to indemnify him for undertaking to secure debts of a mortgagor, who afterwards became bankrupt, will be held, by a court of bankruptcy, to inure to the benefit of the creditors to whom the surety became bound; and the trust for the benefit of such creditors will be enforced by those courts. *Re Pierce*. — *Ex parte White*, 343.
2. If a mortgage, pledge, or lien be given by a principal debtor to secure his surety, and both principal and surety become insolvent, the creditors, whose claims the surety is bound for, have an equity to require the mortgaged property to be applied to the discharge of their debts specifically; but this equity, obtained by subrogation, depends upon the equities between the parties to the mortgages. *Ex parte Morris*. — *Re Foye*, 424.
3. The creditors must first apply their security, and prove against either estate for the deficiency only. *Ib.*
4. If the holders of claims secured by the mortgage to the surety prove in full, they waive their security. Whether if the estate of the surety will pay no dividend, the pledged property should not be surrendered to the assignee of the principal, *quære?* *Ib.*

See BANKRUPT LAW: Proof of Debts, 36; *Re Holbrook*, 259, 263.

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See PRACTICE, 6.

TOW.

Respective liabilities of tug and tow considered. *The Belknap*, 281.

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TRUSTEE PROCESS.

See BANKRUPT LAW: Proof of Debts, 1, 2, 3; INTEREST, 1; PRACTICE, 15.

TRUSTS.

1. Where a bankrupt, being trustee, has deposited trust-money, with his own, in a bank, in his own name, his *cestuis que trustent*, or he representing them, may have a trust declared in the trust-moneys. *Ex parte Hobbs. — Re Hapgood*, 491.
2. The apportionment of the balance of the bank account may be ascertained from the dates of deposits and withdrawals of the trust, and the general funds, respectively. *Ib.*
3. Money was deposited with a trust company by A., and the company agreed to pay the income during the life of B., the son of A., and after his death, during the life of B.'s wife, C., if she should survive him, "the income to be applied to the support of said B. and of his said wife, C., and the education and support of their children," and to cause said payments to be made yearly to B. or C. in the order and for the purposes above stated, upon his or her separate order and receipt, to be dated on or subsequent to the several days on which the said several payments shall fall due, and declared the principal and the annuity to be inalienable, and not to be subject to debts. *Held*, that B. took the annuity as a sub-trustee, and was bound to apply it to the purposes named, and therefore, upon his bankruptcy, his assignee did not take it. *Durant v. Mass. Hospital Life Ins. Co.*, 575.
4. That the court could not apportion the annuity and give the assignee an aliquot part, B. having a wife and seven children. *Ib.*

See MORTGAGE, 1.

USAGE.

1. By the terms of a charter-party a commission of two and a half per cent was to pay for all the services of the charterer's agent, who was to take charge of the ship in a port of necessity. *Held*, that he could not charge five per cent, though the usage of the port was to make that charge. *Mauran v. Warren*, 53.
2. An agent is not to receive payments from both sides; and a custom to do so would not be supported by the courts. *Ib.*
3. Where a boat's crew from whale-ship A. pursued and struck a whale in the Arctic Ocean, and the harpoon, with the line attached to it, remained in the whale, but did not remain fast to the boat, and a boat's crew from ship B. continued the pursuit and captured the whale, and the master of ship A. claimed it on the spot, — *Held*, that an admitted usage that the whale should belong to ship A. under such circumstances was a valid usage, citing an unreported decision of Sprague, J., to same point. *Swift v. Gifford*, 110.
4. There is a usage in the coasting trade to carry a part of the cargo, if heavy and imperishable, on deck, and such a usage is reasonable. *The William Gillum*, 154.
5. Usage to put on board only a part of the bait for a fishing voyage to be conducted off the coast of Nova Scotia, the owners relying on catching suitable fish to supply the deficiency, *held* to be reasonable. *The Tarquin*, 358.

See CHARTER-PARTY, 2, 3; SALVAGE, 7.

VARIANCE.

See INDICTMENT, 2; PLEADING, 1, 2.

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See WHALING VOYAGE, 3, 4.

WAGES.

The wages of the last voyage of a vessel have precedence of all earlier charges. *The J. A. Brown*, 464.

See FISHING VOYAGE, 2, 4; JURISDICTION, 3; LIEN, 7, 9; PAYMENT, 1; SEAMEN, 3, 8, 10, 11, 12, 13, 14; SUBROGATION IN THE ADMIRALTY; WHALING VOYAGE, 7.

WAIVER.

See PRACTICE, 22.

WARING, EX PARTE.

Doctrine of, see *Re Pierce*, 343; *Ex parte Morris*, 424.

WHALING VOYAGE.

1. When catchings of a whaling voyage had been shipped home, and the owners in good faith and in the exercise of their best judgment had kept them, unsold, hoping for a rise in the market, — *Held*, they were not bound to account for them at their value when they arrived. *Frates v. Howland*, 36.
2. Whether after receiving such catchings they would not be bound to stop any charges for interest on advances to seamen, *quære?* *Ib.*
3. A contract between owners and master for a whaling voyage not exceeding five years' duration does not mean several voyages extending through five years, but ends when the object of the voyage is fulfilled; that is, when a full cargo is obtained. *Slocum v. Swift*, 212.
4. When the voyage was to end at New Bedford, and the parties afterward agreed to end it at San Francisco, the master was allowed the expenses of his passage to New Bedford. *Ib.*
5. The owners were allowed freight on oil from San Francisco to New Bedford. *Ib.*
6. Commissions charged for sales by owners disallowed. *Ib.*
7. A seaman in the whaling service, who, having become separated from his ship by no fault of his own, fails to rejoin her from causes which he cannot control, is entitled to wages to the time of separation, and the expenses of return to his country, as if the ship had left him behind for sickness. *Antone v. Hicks*, 383.

8. Where the master sold the effects of such a seaman by auction, and there was no evidence of negligence or bad faith on his part, the owner of the ship was held liable only for the amount realized by the sale. *Ib.*

See AFFREIGHTMENT, 1; APPURTENANCES, 1; MASTER; USAGE, 3.

WITNESS.

See BANKRUPT LAW: Rights, Duties, &c., of Bankrupt, 3, 4; EVIDENCE, 3, 4.

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